

IN THE SUPREME COURT OF MISSOURI

SC 86712

**STATE OF MISSOURI *ex rel.* AMOCO OIL COMPANY,
now known as BP PRODUCTS NORTH AMERICA INC.,**

Relator,

vs.

**THE HONORABLE JOHN J. RILEY,
Circuit Court Judge, 22nd Judicial Circuit, Missouri,
Respondent.**

**ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE JOHN J. RILEY, CIRCUIT JUDGE
TWENTY-SECOND JUDICIAL CIRCUIT, MISSOURI
REGARDING CAUSE NO. 002-8365**

BRIEF ON BEHALF OF RESPONDENT

**Michael P. Gunn, #20654
John R. Gunn, #50341
THE GUNN LAW FIRM, P.C.
1714 Deer Tracks Trail, Suite 240
St. Louis, MO 63131
Telephone: (314) 965-1200
Fax: (314) 965-1054**

**Mark M. Lawson
Eric D. Franz
David A. Bragdon
BURR & FORMAN LLP
3100 SouthTrust Tower
420 N. Twentieth Street
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Fax: (205) 458-5100**

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES	6
II. INTRODUCTION	14
III. FACTUAL BACKGROUND	18
A. The Trial Court’s October 12, 2004 Sanctions Order and February 25, 2005 Order Denying Reconsideration of the Sanctions Order	19
1. The Trial Court’s 10/12/04 Sanctions Order	19
2. The Court’s February 25, 2005 Order Rejecting BP’s Motion to Reconsider Its Order Sanctioning BP for Wrongful Conduct	25
B. The Trial Court’s Sanction Was Based on BP’s Repeated Violations of Its Discovery Obligations, the Trial Court’s Repeated Orders, and BP’s Own Stipulation	26
1. It Took Four Orders Compelling BP to Produce Responsive Documents Before BP Produced a Single E-mail	27
a. BP Refused to Produce a Single Document in Response to the Plaintiffs’ Requests for Production	27
b. Even after Compelled to Produce Responsive Documents, BP Refused to Follow the Trial Court’s Order	29
c. Before Being Compelled a Second Time to Produce Responsive Documents, BP Produced No E-mails	32
2. BP’s Process of Reviewing E-mails Was Grossly Inadequate and Involved Hiding Information from the Plaintiffs and the Court	33

a.	Overview.....	33
b.	BP's Changing Number of E-mails.....	35
c.	Plaintiffs Were Not Provided an Opportunity to Review BP's Search Terms	40
d.	BP's Sloppy Electronic Searches	42
e.	Examples of BP's Other Misconduct Warranting a Lack of Trust.....	47
3.	BP's Ability to Review the E-mails for Privilege	48
C.	The Trial Court Reasonably Rejected BP's Methodology	49
D.	Timeline of Events	52
IV.	ARGUMENT	61
A.	Overview.....	61
B.	The Sanctions Imposed by Judge Riley Were Not an Abuse of Discretion and BP's First Point About Relevance Is Inapplicable Here	62
1.	Abuse of Discretion Is the Standard of Review for an Order Granting Sanctions	62
2.	Overview.....	64
3.	BP Violated Its Discovery Obligations, the Trial Court's Orders, and BP's Own Stipulation to the Court	66
a.	BP Simply Did Not Produce E-mails Within the Time Limits Repeatedly Set for It	66

b.	BP's Method of Gathering E-mail Violated Its Discovery	
	Obligations	69
i.	Overview.....	69
ii.	Electronic Searches Are Allowed Only by Permission of the Court or Agreement by the Parties.....	71
(a)	Case Law	71
(b)	Logic and Common Sense Compel the Unanimous Rule of Only Applying Keyword Searches Where There Is Agreement by the Parties or an Order by the Court.....	79
iii.	No Subject Line Review Is Allowed.....	81
iv.	Applying the Above Case Law, BP Did Not Follow the Rules for Electronic Searches	83
(a)	Plaintiffs Were Not Provided an Opportunity to Review BP's Search Terms	83
(b)	The Searches Themselves Were Not Well Formulated.....	83
(c)	BP Removed E-mails Based on Their Subject Line	84
4.	The Plaintiffs Were Prejudiced.....	85

5.	Judge Riley’s Sanction Against BP—Requiring Production of an Additional 200,260 E-mails—Was Appropriate	89
a.	Overview.....	89
b.	Under the Facts of This Case, the Trial Court Could Have Imposed the Extreme Punishment of Default Judgment	92
c.	The Trial Court Did Not Abuse Its Discretion in Ordering BP to Produce All 501,361 E-mails as a Sanction	96
d.	Contrary to BP’s Third and Fifth Points, the Trial Court Did Not Abuse Its Discretion in Finding that Its Sanction Was Not Overly Burdensome and That Cost-Shifting Was Not Appropriate	99
i.	Overview.....	99
ii.	Contrary to BP’s Third Point, a Privilege Review of the 200,260 E-mails Is Not Unduly Burdensome	100
iii.	Contrary to BP’s Fifth Point, the Trial Court Did Not Abuse Its Discretion in Denying Cost-Shifting	105
(a)	Cost Shifting Is Inappropriate Because the Cost Was Caused by BP’s Wrongful Conduct	105
(b)	Cost-Shifting Is Inappropriate Because Courts Do Not Allow Cost-Shifting for Accessible Data.....	105

C.	BP’s Second and Fourth Points about Privileged Materials and Confidentiality Are Misplaced.....	109
1.	Contrary to BP’s Second Point, the Trial Court Has Consistently Allowed BP the Opportunity to Review Its E-mails for Privilege—an Opportunity BP Still Has If the Trial Court’s Orders Are Affirmed	109
2.	Contrary to BP’s Fourth Point, the Trial Court Did Not Exceed Its Authority by Violating the Privacy Expectations of Any Third Parties	117
V.	CONCLUSION	123
	CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE AND CERTIFYING WORD COUNT	127

I. TABLE OF AUTHORITIES

Cases

Alexander v. FBI,

188 F.R.D. 11, 18 (D.D.C 1998).....72

Amick v. Horton,

689 S.W.2d 369, 376-77 (Mo. Ct. App. 1985).....95

Baughn v. Rapidways Truck Leasing Co. v. Gen. Motors Corp,

698 S.W.2d 618, 620 (Mo. Ct. App. 1985).....95

Bethell v. Porter,

595 S.W.2d 369, 377 (Mo. Ct. App. 1980).....64

<i>Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.,</i>	
2005 WL 679071, at *1 ¶ 3 (Fla. Cir. Ct. 2005).....	73
<i>Commonwealth v. Hinds,</i>	
768 N.E.2d 1067, 1071-73 (Mass. 2002).....	74
<i>Commonwealth. v. Proetto,</i>	
771 A.2d 823, 829, 832 (Pa. Sup. 2001).....	119
<i>Cooper Tire & Rubber Co. v. McGill,</i>	
890 So. 2d 859, 867 (Miss. 2004).....	91,
Error! Bookmark not defined.	
<i>Daewoo Elecs. Co. v. United States,</i>	
650 F. Supp. 1003, 06 (Ct. Int’l Trade 1986).....	70
<i>Dobbs v. Dobbs Tire & Auto Centers, Inc.,</i>	
969 S.W.2d 894, 899 (Mo. Ct. App. 1998).....	64, 95
<i>Dodge, Warren & Peters Ins. Servs., Inc. v. Riley,</i>	
105 Cal. Rptr. 2d 385, 388 (Cal. App. 2003).....	72
<i>Enos v. Ryder Automotive Operations, Inc.,</i>	
73 S.W.3d 784, 791 (Mo. Ct. App. 2002).....	117
<i>Garrity v. John Hancock Mut. Life Ins. Co.,</i>	
2002 WL 974676, *2 (D. Mass. 2002).....	119
<i>Goede v. Aerojet General Corp.,</i>	
143 S.W.3d 14, 22 (Mo. Ct. App. 2004).....	117
<i>Great W. Trading Co. v. Mercantile Trust Co. Nat’l Ass’n,</i>	

661 S.W.2d 40, 43 (Mo. Ct. App. 1983).....	95
<i>Guest v. Leis,</i>	
255 F.3d 325, 333 (6th Cir, 2001).....	122
<i>Hilmer v. Hezel,</i>	
492 S.W.2d 395, 397 (Mo. Ct. App. 1973).....	64
<i>In re Ford Motor Co.,</i>	
345 F.3d 1315, 1317 (11th Cir. 2003).....	92
<i>In re Gen. Instrument Corp. Securities Litigation,</i>	
1999 WL 1072507 (N.D. Ill. 1999).....	107
<i>In re Hagemeyer North America, Inc.,</i>	
222 F.R.D. 594, 599-600 (E.D. Wis. 2004).....	107
<i>In re John Doe Proceeding,</i>	
272 Wis. 2d 208, 239 n.18, 245 680 N.W.2d 792, 807, n.18, 810 (2004).....	74, 77
<i>In re Marriage of Lindeman,</i>	
140 S.W.3d 266, 271 (Mo. Ct. App. 2004).....	93-93
<i>In re Search of 3817 W. West End, First Floor Chicago, Illinois 60621,</i>	
321 F. Supp. 2d 953, 959 (N.D. Ill. 2004).....	73
<i>J & H Gibbar Constr. Co., Inc. v. Adams,</i>	
750 S.W.2d 580, 584 (Mo. Ct. App. 1988).....	29
<i>Jake C. Byers, Inc. v. J.B.C. Investments,</i>	
834 S.W.2d 806, 820-21 (Mo. Ct. App. 1992).....	29
<i>Jaen v. Coca-Cola Co.,</i>	

157 F.R.D. 146, 149 (D.P.R. 1994).....	91,
Error! Bookmark not defined.	
<i>J.C. Assocs. v. Fidelity & Guaranty Ins. Co.,</i>	
2005 WL 1570140, at *2 (D.D.C. 2005).....	72
<i>Karolat v. Karolat,</i>	
151 S.W.3d 852, 858 (Mo. Ct. App. 2004).....	63
<i>Klein v. General Elec. Co.,</i>	
728 S.W.2d 670, 671 (Mo. Ct. App. 1987).....	90
<i>Long v. Long,</i>	
135 S.W.3d 538, 544 (Mo. Ct. App. 2004).....	105, 108
<i>Luster v. Gastineau, Jr.,</i>	
916 S.W.2d 842, 844-45 (Mo. Ct. App. 1996).....	95
<i>McClaren v. Microsoft Corp.,</i>	
1999 WL 339015 (Tex. Ct. App. 1999).....	119
<i>McManemin v. McMillin,</i>	
157 S.W.3d 304, 305 (Mo. Ct. App. 2005).....	64, 88, 95
<i>Murphy Oil USA, Inc. v. Fluor Daniel, Inc.,</i>	
2002 WL 246439, at *5-7 (E.D. La. 2002).....	107, 114
<i>Norber v. Marcotte, 1</i>	
34 S.W.3d 651, 660 (Mo. Ct. App. 2004).....	63, 64, 88, 94
<i>OpenTV v. Liberate Techs.,</i>	
219 F.R.D. 474, 477 (N.D. Cal. 2003).....	107-108

<i>Proctor & Gamble Co. v. Haugen,</i>	
179 F.R.D. 622, 632 (D. Utah 1998).....	72
<i>Restorative Servs., Inc. v. Prof'l Care Ctrs., Inc.,</i>	
793 S.W.2d 141, 144 (Mo. Ct. App. 1990).....	94
<i>Roadway Express, Inc. v. Piper,</i>	
447 U.S. 752, 763-64 (1980).....	91
<i>Rowe Entertainment v. The William Morris Agency, Inc.,</i>	
205 F.R.D. 421, 432 (S.D.N.Y. 2002).....	108, 114
<i>Scott v. LeClercq,</i>	
136 S.W.3d 183, 190 (Mo. Ct. App. 2004).....	93, 94
<i>Seattle Times Co. v. Rhinehart,</i>	
467 U.S. 20, 30 (1984).....	119
<i>Smyth v. The Pillsbury Co.,</i>	
914 F. Supp. 97, 101 (E.D. Pa. 1996).....	119
<i>State ex rel. Dixon Oaks Health Center, Inc. v. Long,</i>	
929 S.W.2d 226, 231 (Mo. Ct. App. 1996).....	119
<i>State ex. rel. Ford Motor Co. v. Westbrooke,</i>	
151 S.W.3d 364, 369 (Mo. 2005).....	87, 115
<i>State ex rel. Missouri Ethics Comm'n v. Nichols,</i>	
978 S.W.2d 770, 774 (Mo. Ct. App. 1998).....	119
<i>State ex rel. Missouri Highway and Transp Com'n v. Pully,</i>	
737 S.W.2d 241 (Mo. Ct. App. 1987).....	63

<i>State ex rel. Ramblin' Int'l, Inc. v. Peters,</i>	
711 S.W.2d 597, 602 (Mo. Ct. App. 1986).....	66
<i>State ex rel. Stecher v. Dowd,</i>	
912 S.W.2d 462, 464 (Mo. 1995).....	119
<i>Sutherland v. Mesa Air Group, Inc.,</i>	
2003 WL 21402549, at *5 (S.D. Fla. 2003).....	91,
Error! Bookmark not defined.	
<i>Tennis v. Gen. Motors Corp.,</i>	
625 S.W.2d 218, 235 (Mo. Ct. App. 1981).....	64, 85, 89
<i>TGB Ins. Services Corp. v. Superior Court,</i>	
96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155, 161-62 (Cal. App. 2002).....	121, 122
<i>Thygeson v. U.S. Bancorp,</i>	
No. CV-03-467-ST, 2004 WL 2066746 (D. Or. Sept. 15, 2004).....	119
<i>United States v. Jones,</i>	
No. 03-15131, 2005 WL 2284283 (11th Cir. Sept. 20, 2005).....	122
<i>United States v. King,</i>	
55 F.3d 1193, 1195-96 (6th Cir, 1995).....	122
<i>United States v. Lifshitz,</i>	
369 F.3d 173, 190 (2d Cir. 2004).....	122
<i>United States v. Procter & Gamble Co.,</i>	
356 U.S. 677, 682 (1958).....	88
<i>United States v. Simons,</i>	

206 F.3d 392, 398-99 (4th Cir. 2000).....	122
<i>VonSande v. VonSande</i> ,	
858 S.W.2d 233, 237 (Mo. Ct. App. 1993).....	29
<i>Wilkerson v. Prelutsky</i> ,	
943 S.W.2d 643, 647-48 (Mo. 1997).....	62, 90
<i>Wiginton v. CB Richard Ellis, Inc.</i> ,	
229 F.R.D. 568, 570 (N.D. Ill. 2004).....	73, 76, 107
<i>Wilkerson v. Prelutsky</i> ,	
943 S.W.2d 643, 647-48 (Mo. 1997).....	117
<i>Zornes v. Specialty Industries, Inc.</i> ,	
1998 WL 886997, at *9 (4th Cir. 1998).....	90, 91
<i>Zubulake v. UBS Warburg LLC (“Zubulake I”)</i> ,	
217 F.R.D. 309, 315 (S.D.N.Y. 2003).....	74, 106
<i>Zubulake v. UBS Warburg LLC (“Zubulake III”)</i> ,	
216 F.R.D. 280, 290 (S.D.N.Y. 2003).....	75
<i>Zubulake v. UBS Warburg LLC (“Zubulake V”)</i> ,	
2004 WL 1620866, at *8 (S.D.N.Y. 2004).....	50, 72, 74

Rules

<i>Mo. Sup Ct. R. 56.01</i>	119
<i>Mo. Sup. Ct. R. 61.01</i>	62, 90

Secondary Authorities

American Bar Association, <i>Amendments to Civil Discovery Standards</i> § VIII, Standard 31(a)(xi) and comment (Aug. 2003), Ex. 62, at A1830-33.....	78
American Management Association, <i>2001 AMA Survey, Workplace Monitoring & Surveillance, Summary of Key Findings</i> (April 2001), at <i>Respondent's</i> A270.....	121
Gantt, <i>An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace</i> , 8 Harv. J.L. & Tech. 345, 404-405 (Spring 1995), at <i>Respondent's</i> A125.....	122
David K. Isom, <i>Electronic Discovery Primer for Judges</i> , 2005 Fed. Cts. L. Rev. 1, II.J.7 (2005), at <i>Respondent's</i> A278.....	71
Fernandez, <i>Workplace Claims: Guiding Employers and Employees Safely In And Out of the Revolving Door</i> , 614 Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, Litigation 725 (1999), at <i>Respondent's</i> A191.....	122
McIntosh, <i>E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace</i> , 23 Hamline L. Rev. 539, 541-542, n.10, at <i>Respondent's</i> A220.....	121
Ronald J. Hedges, <i>Discovery of Digital Information</i> , SK094 ALI-ABA 231, 249-50 (2005), at <i>Respondent's</i> A311.....	78
<i>The Sedona Principles: Best Practices Recommendations Principles for Addressing Electronic Document Production</i> , at 39, Ex. 42, at A1400.....	77

II. INTRODUCTION

This is a sanctions case pure and simple. Over a two (2) year period BP violated four court orders requiring it to produce emails. BP flat-out refused to abide by the first order without seeking the shelter of a protective order. In regard to other orders, BP continued to miss production dates and engaged in a practice of delay and obstruction. Each time there was a different story. Each time Plaintiffs filed new motions to compel or motions for sanctions and had to have new hearings before the trial court - delaying Plaintiffs' discovery in this case, delaying the trial of this case and costing Plaintiffs hundreds of attorney hours and significant expense. BP even violated its own written stipulation to Plaintiffs and the trial court regarding the production of emails. BP produced hundreds of thousands of emails fewer than what it had agreed to produce and did not identify this fact to Plaintiffs or provide any explanation.

BP now seeks to overturn the trial court's order granting *Plaintiffs' Motion for Sanctions*.¹ The trial court found that BP had violated its discovery obligations, the court's past orders, and BP's own stipulation. The court also found that Plaintiffs were prejudiced by these violations. As a result, the Court imposed one of the sanctions requested by the Plaintiffs—production of 501,361 e-mails that BP pulled from the mailboxes of “key players.” Only 200,260 of these e-mails are at issue in this case

¹ 10/14/04 Order, at 1, 3, A704, A706.

because BP produced or listed on a privilege log the remaining 301,101.² Since the trial court's *Order* was a sanctions order, the only way BP can succeed on this appeal is to show that the trial court abused its discretion by (1) finding discovery violations by BP; (2) finding that Plaintiffs suffered prejudice; or (3) imposing the production of the 200,260 additional e-mails (minus any BP removes for privilege) as a discovery sanction for BP's misconduct. Yet, somehow BP manages to write a 124 page brief to this Court *without even mentioning the rule governing sanctions, the legal standard for sanctions, and the numerous cases discussing the appropriateness of sanctions*.

The trial court based its sanctions order on BP's repeated discovery violations and its failure over a *two year period* to follow multiple court orders compelling production of responsive documents. Even after the trial court's second order compelling BP to produce responsive documents, including e-mails, BP engaged in a sloppy, unilateral electronic search to "determine" what e-mails were responsive to Plaintiffs' requests. BP admits that the 501,361 e-mails that it searched were from the mailboxes of "key players" to the litigation. But BP did not consult the Plaintiffs or the trial court before conducting this search, and it did not follow a protocol that any court has used or endorsed for conducting an electronic search for documents. BP's search left out more than 30 identifying numbers for the Plaintiffs; it left out names of certain Plaintiffs and misspelled the name of at least one Plaintiff; and it omitted key acronyms and terms that

² These numbers are undoubtedly confusing, and a chart an explanation of them is listed below, *infra* § III.B.2.b.

are highly relevant to this case. As a result, the 200,260 e-mails at issue in this appeal are potentially relevant e-mails that have never been adequately searched for responsiveness.

In addition, BP kept changing the number of e-mails it claimed were responsive, causing both the trial court and the Plaintiffs to further lose trust in BP. It first identified 310,994 e-mails as responding to its search terms, and it agreed in open court to produce these e-mails. But when Plaintiffs used a computer technician to determine how many e-mails BP actually produced, there were only 115,885. After the Plaintiffs filed another motion for sanctions, BP produced more e-mails—once again without identifying the number it had produced. After a further count, the numbers still did not add up, and it turned out that BP had only produced 300,219 e-mails. At this point, the court was completely frustrated with BP's total failure to follow its own agreement—much less the courts' orders and BP's discovery obligations. The Court issued its October 12 sanctions order, and also demanded that BP give an accounting for the difference between the e-mails it had gathered and the e-mails it had produced. *Only after that order did BP reveal for the first time that (1) the 310,994 number it had previously given in a sworn affidavit was allegedly wrong and should have been 306,947; and (2) it had removed 5,846 e-mails based on a subject line review—a review it had never told the Plaintiffs or the Court about and that had no precedent in any court.*

Rather than issuing some other sanction against BP and demanding that BP perform another search of the remaining 200,260 e-mails using a more appropriate protocol, the trial court simply ordered BP to produce all 200,260 non-privileged e-mails. The court decided that production of the 200,260 e-mails was appropriate because of

BP's past discovery violations and the lengthy delays BP had caused. The trial court reasonably did not trust BP to act in good faith in performing a new electronic search and undoubtedly expected that if it ordered one, BP would engage in the same obstruction, delay, bad faith, and violation of court orders that it had done in the past. Since the trial court would have been fully within its authority to grant a default judgment against BP—as the Plaintiffs had asked it to do—the trial court's sanction was actually very lenient.

BP argues that Plaintiffs should pay for the cost of BP setting up an electronic database—which BP has no plans to share with the Plaintiffs—so that BP's attorneys may more easily review these e-mails for privilege. But BP's cost is the direct result of its own past discovery violations. If it had conducted an adequate electronic search the first time, there would be no need for it to pay to have a third party re-search the e-mails. Because BP's costs are a direct result of its own wrongful behavior, the trial court did not abuse its discretion in ordering that BP should bear its own costs. In addition, BP admits that the e-mails are already in their original format and loaded onto CD ROMs. Producing them in this format requires no cost. Case law has uniformly rejected cost-shifting when electronic documents are "accessible," such as here where they were gathered off a hard-drive or network. Courts have also rejected shifting fees that are related to reviewing electronic documents for privilege. For both of these reasons, the trial court did not abuse its discretion in denying BP's request for cost-shifting.

BP also argues that the trial court ordered it to produce privileged documents. *This is completely untrue.* BP had *two years* after being compelled to produce responsive documents to review its e-mails for privilege, but it did not do so. After the

trial court ordered BP to produce the responsive e-mails, BP has had another *entire year* to conduct a privilege review, but it has not done so. In addition, BP asked the trial court for two weeks to review the e-mails for privilege if it had to produce the 200,260 e-mails. The trial court gave BP the fifteen days it asked for following the order to review the e-mails for privilege, and the trial court has continued to enter orders providing BP fifteen days to review e-mails for privilege after a final order is entered. The *total of three years* BP has had to review e-mails for privilege is more than sufficient. And BP will still have fifteen days following this Court's order to conduct a privilege review—the exact amount of time it requested.

Accordingly, the trial court did not abuse its discretion in ordering that, as a sanction, BP produce the remaining 200,260 e-mails or a privilege log listing any it had removed. BP's Petition should therefore be denied.

III. FACTUAL BACKGROUND

The bulk of the trial record needed for this Court's review is contained in the Relator's Appendix. Plaintiffs, however, do find it necessary to submit their own appendix and they do not want the Court to be confused as to which appendix they are referring to. Since most of the cites in this brief are to *Relator's* Appendix, they will simply be referred to by their page number (e.g., A1114). For references to the appendix to this brief, Plaintiffs will use "Respondent's" and then the page number (e.g., Respondent's A1114). This should avoid any confusion.

A. The Trial Court's October 12, 2004 Sanctions Order and February 25, 2005 Order Denying Reconsideration of the Sanctions Order

Before discussing the history of BP's production and discovery conduct, it is important to understand that the orders at issue before this Court were orders for *sanctions*. As a result, the history of BP's conduct takes on increased significance because this Court must determine whether the trial court abused its discretion in (1) finding discovery violations; (2) finding prejudice to the Plaintiffs; and (3) ordering the production of 200,260 additional e-mails as a sanction. BP never says in its brief that the October 12, 2004 Order is a sanctions order, and it writes its entire brief as if the Court had merely decided a motion to compel production of 200,260 e-mails on the basis of relevance and responsiveness. Accordingly, Plaintiffs first show that the October 12, 2004 and February 25, 2005 orders were *sanctions* orders.

1. The Trial Court's 10/12/04 Sanctions Order

The trial court's *10/12/04 Order* was a ruling on *Plaintiffs' Motion for Sanctions*.³ This *Motion for Sanctions* was directed specifically at BP's failure to produce responsive e-mails as it had previously been ordered several times to do.⁴ In the *Motion for*

³ *10/12/04 Order*, at 1, Ex. 27, A704.

⁴ *Plaintiffs' Motion for Sanctions* (Sept. 7, 2004), Ex. 23, A564. This *Motion* was not the first motion for sanctions. See *Motion to Compel & for Discovery Sanctions* (Feb. 27, 2004), Ex. 13, A249.

Sanctions, Plaintiffs requested three forms of relief for the prejudice they suffered by BP's conduct:

Plaintiffs request that their Motion for Sanctions be granted and that the Court order that:

- The Defendant's answer and affirmative defenses be stricken.
- The Defendant be required to pay for all of Plaintiffs' attorney's fees for discovery.
- ***The Defendant be compelled to produce all 501,361 e-mails and attachments within five (5) days of this Court's order.***⁵

Plaintiffs asked that all 501,361 e-mails be produced because after several years since *Plaintiffs' Requests for Production*, BP had not conducted a fair search to actually determine which of the 501,361 e-mails were responsive.⁶ In addition, BP's conduct in withholding nearly 2/3 of the e-mails it promised to produce, as well as its other wrongful conduct, was deserving of sanctions, including "produc[ing] all 501,361 e-mails."⁷

At a hearing on this *Motion*, the Plaintiffs presented additional evidence of BP's discovery violations, and the Court granted the *Plaintiffs' Motion for Sanctions*. But it only issued ***one*** of the three sanctions requested by the Plaintiffs—production of the full

⁵ *Plaintiffs' Motion for Sanctions*, at 7, Ex. 23, A571.

⁶ *Id.* at 1-6.

⁷ *Id.*

501,361 e-mails.⁸ In explaining why this sanction was appropriate, the Court specifically mentioned the four prior orders it had issued, BP's failure to follow them, BP's failure to follow its own stipulation, BP's failure to conduct its search adequately, and the Plaintiffs' prejudice as a result of this wrongful conduct:

[Plaintiffs brought their Motion for Sanctions citing] Defendant's failure to provide Plaintiff[s] certain emails and attachments as required by the Court's earlier orders and the parties' stipulation of August 24, 2004. The Court notes that four prior orders of the Court related to these emails were issued on October 7, 2002, July 20, 2004, August 17, 2004, and August 24, 2004....

The Court's Order of July 20, 2004 required Defendant to produce the responsive e-mails and attachments within 30 days. The Court's Order of August 17, 2004 denied Defendant's request for an extension of time to produce them. Thus, Defendant was ordered to produce these materials without further delay. Defendant stipulated and represented to the Court on August 24, 2004 [five days after ordered to produce all responsive documents] that it would produce the "approximately 300,000" requested emails and attachments as previously ordered. Plaintiffs' written motion contends that the six CDs they received from Defendant containing these materials contain only 115,885 emails and attachments, and that Defendant

⁸ *10/12/04 Order*, at 3, Ex. 27, A706.

withheld approximately 200,000 to determine “if any of them are deemed responsive, non-privileged communications.” Plaintiffs also presented evidence indicating that the email mailboxes from which the 501,361 emails were initially taken do not, contrary to the statement of Defendant, contain all potentially [responsive] emails to the request to produce because the mailbox of at least one person who received a “cc” copy of relevant information was not included in that list of email addresses. Plaintiffs argue that they have been prejudiced by these continual delays, and by the increased costs associated with obtaining the discovery to which they are entitled, hampering their ability to pursue this case. For these reasons, among others, Plaintiffs request that BP be compelled to produce all 501,361 emails and attachments referred to above....

After a careful review of this case[,] the Court, in its discretion, agrees that the relief sought by Plaintiffs is warranted.⁹

Despite the Court’s finding of wrongdoing and prejudice, *the Court still gave BP twenty-one days* to produce the documents—four times as long as Plaintiffs had requested—*so that BP could remove privileged documents* and “provide ... a privilege log for any specific emails or attachments not provided.”¹⁰

⁹ *Id.* at 1-3, Ex. 27, A704-06.

¹⁰ *Id.* at 3, Ex. 27, A706 (emphasis added).

BP argues that “[t]he trial court’s Orders are based on the incorrect assumption that the 200,000 e-mails are potentially relevant.”¹¹ But the e-mails certainly are “potentially relevant.” BP admits that the e-mails come from “employees that BP considered to be the ‘key players’ in the lawsuit.”¹² As discussed further below (supra § IV.B.3.b), BP’s search was wholly inadequate to determine what e-mails were relevant and what e-mails were not. As a result, the 200,260 e-mails *are* potentially relevant.

In addition, BP puts too much significance on the court’s statement. In reality, the fact that the e-mails are “potentially responsive” is provided more by way of background information since the court is determining whether BP should be sanctioned, not whether the entire block of e-mails could be compelled in a simple motion to compel.¹³ It is surprising that BP complains about the Court’s description of the 501,361 e-mails as being identified by BP as “potentially responsive” since this factual description appears to come from *BP’s own brief* stating that it first collected “approximately 500,000 e-mails and attachments from its employees,” and that by “[u]sing the search term list, the

¹¹ *Relator’s Brief*, at 62; *see also id.* at 40.

¹² *Id.* at 29.

¹³ *10/12/04 Order*, at 1-2, Ex. 27, A704-05 (“Defendant[] eventually identified 501,361 emails and attachments as being potentially responsive to the requests to produce. By scanning these emails for certain search terms Defendant determined that 310,994 were potentially discoverable. Plaintiffs’ numerous motions to compel and for sanctions center on [their] efforts to obtain these e-mails and attachments.”).

amount of *potentially responsive* e-mails was *reduced* to approximately 311,000 e-mails and attachments.”¹⁴ The Court uses this as background information, relying on BP’s wrongful conduct and prejudice to the Plaintiffs to determine that BP should be sanctioned.¹⁵

BP also complains that the Court mentions that “‘the mailbox of one person who received a ‘cc’ copy of relevant information was not included’ in the list of mailboxes that BP downloaded.”¹⁶ BP argues that:

The trial court’s reasoning is flawed. The additional 200,000 e-mails were downloaded from the same mailboxes of the same employees as the 301,000 e-mails that were produced—the additional e-mails are simply those same employees’ e-mails that did not hit a search term. Ordering BP to produce the additional 200,000 e-mails will not yield any relevant e-mails from an employee who was not included in the original search, unless that employee received or was copied on an e-mail that was sent or received by one of the original 61 people whose e-mail was downloaded.¹⁷

¹⁴ *Defendant’s Memorandum in Opposition to Plaintiffs’ Motion for Sanctions*, Ex. 25, A638-39 (emphasis added).

¹⁵ *See supra* n.9 & accompanying text.

¹⁶ *Relator’s Brief*, at 64.

¹⁷ *Id.*

But once again, BP misunderstands the purpose of the court's comment. The court was giving yet another example of how BP had violated its discovery obligations—one of the elements for imposing sanctions.

2. The Court's February 25, 2005 Order Rejecting BP's Motion to Reconsider Its Order Sanctioning BP for Wrongful Conduct

The Court's February 25, 2005 Order affirmed its earlier sanctions order and provided BP an additional fifteen days to conduct its privilege review—one day more than BP had requested. The order relies upon BP's failure to comply with the court's discovery orders and its failure to "*fully and timely comply with*" "*the 8/24/04 stipulation*":

The Court has carefully reviewed the long and tortured history as to the parties' ongoing discovery dispute concerning BP employee e-mails. *Its order of October 12, 2004 was based, in significant part, on that history—including but certainly not limited to the 8/24/04 stipulation, which Defendant did not fully and timely comply with....*

In view of the history of this matter, as well as the showing Plaintiffs have made, the Court continues to believe its order of October 12, 2004 was reasonable and proper.¹⁸

Once the Court's orders are understood for what they are—sanctions orders—one can review the history of BP's conduct to determine whether sanctions were warranted and

¹⁸ 2/25/05 Order, at 2, A1220 (emphasis added).

whether the sanction of producing the 200,260 additional e-mails was an abuse of discretion.

BP also argues that “[t]he trial court never made ... a finding” that “BP’s use of search terms [was] ‘belated and unfair.’”¹⁹ But the trial court did specifically find that BP “*did not fully and timely comply with*” “*the 8/24/04 stipulation.*”²⁰ In other words, the trial court found that BP’s failure to act in a timely manner and its failure to “fully ... comply with” even its own stipulation deserved sanctions.

B. The Trial Court’s Sanction Was Based on BP’s Repeated Violations of Its Discovery Obligations, the Trial Court’s Repeated Orders, and BP’s Own Stipulation

The trial court did not order BP to produce the 200,260 e-mails at issue here until it had already ordered BP “four” times to produce responsive “emails.”²¹ These orders,

¹⁹ *Relator’s Brief*, at 6.

²⁰ *2/25/05 Order*, at 2, A1220 (emphasis added).

²¹ *10/12/04 Order*, Ex. 27, A704 (“The Court notes that four prior Orders of the Court related to these emails and were issued on October 7, 2002, July 20, 2004, August 17, 2004, and August 24, 2004.”); *see also* *10/7/02 Amended Order*, at 10, Ex. 9, A203 (“grant[ing] plaintiffs’ motion to compel”); *7/20/04 Order*, Ex. 18, A512 (further “order[ing] [BP] to provide discovery ordered by this Court’s October 7, 2002 Order”); *8/17/04 Order*, Ex. 20, A561 (denying BP’s *Motion for Extension of Time* to review and produce e-mails); *8/24/04 Order*, Ex. 22, A564 (granting “*Plaintiffs’ Second Motion to*

which BP has not appealed, required BP to produce only *responsive* documents—including e-mails. When BP failed to do so over a period of two years and after four orders, the court issued the October 12, 2004 Sanctions Order. BP’s wrongful discovery conduct extends far beyond its conduct related to e-mails, but this discussion will focus on its e-mail related violations. For a discussion of some of BP’s other discovery violations, *see Plaintiffs’ Reply Memorandum in Further Support of Their Motion for Sanctions*, (Dec. 10, 2004), at *Respondent’s* A41-48.

1. It Took Four Orders Compelling BP to Produce Responsive Documents Before BP Produced a Single E-mail

a. BP Refused to Produce a Single Document in Response to the Plaintiffs’ Requests for Production

On December 5, 2001, Plaintiffs served their *Requests for Production*, specifically including “e-mail.”²² But on May 23, 2002 (5 1/2 months later), BP still had not produced a single document. So Plaintiffs filed their first *Motion to Compel*.²³ BP’s only excuse for failing to produce any documents was that the parties could not agree on a

Compel” covering additional discovery and postponing Plaintiffs’ requests for sanctions until a later hearing).

²² *Plaintiffs’ First Request for Production to Defendants*, Ex. 2, A12.

²³ *Plaintiffs’ Motion to Compel Discovery* (May 23, 2002), Ex. 6, A151.

protective order.²⁴ But Plaintiffs had promised that they would follow BP's version of the protective order in the meantime to allow discovery to go forward until the Court decided on a protective order.²⁵ Even though Plaintiffs addressed BP's stated concerns, BP rejected Plaintiffs' offer and refused to produce any documents.²⁶

On October 7, 2002, ten months after Plaintiffs served their *Requests for Production*, BP still had not produced a single document. The trial court denied BP's Motion for a protective order because BP's proposed order was too broad.²⁷ The court granted *Plaintiffs' Motion to Compel*.²⁸ Under that order, the Court compelled BP to produce all responsive documents within five days.²⁹

²⁴ *Defendant's Memorandum in Opposition to Plaintiffs' Motion to Compel*, Ex. 7, A173-74 (demanding at a minimum that Plaintiffs agree to BP's version of an "interim protective order" prior to production of any documents).

²⁵ *Plaintiffs' Motion to Compel Discovery* ¶ 3, Ex. 6, A152-53. *Defendant's Memorandum in Opposition to Plaintiffs' Motion to Compel*, Ex. 7, A173-74 (not denying that Plaintiffs had offered this and that BP had refused to take them up on it).

²⁶ *Id.*

²⁷ 10/7/02 *Amended Order*, at 10, Ex. 9, A203.

²⁸ *Id.*

²⁹ *Id.*

**b. Even after Compelled to Produce Responsive Documents,
BP Refused to Follow the Trial Court's Order**

Rather than producing responsive documents, BP claimed that it did not have to follow the trial court's order because of an alleged *ex parte communication* between Plaintiffs' counsel and the Judge Neill.³⁰ Amazingly BP refused to obey the order without ever moving for reconsideration or a protective order. BP claimed that Plaintiffs' counsel told the judge that a certificate of compliance had been filed with the *Motion to Compel*—which it undisputedly had. BP never contested that the certificate of compliance had been filed, and the communication was entirely procedural.³¹ Missouri law clearly permits *ex parte* communications regarding such “procedural matters”³² BP

³⁰ At this point in time, Judge Neill, not Judge Riley, was handling discovery matters.

³¹ BP's counsel apparently engaged in a similar procedural discussion with the judge when opposing counsel was absent. *BP's Supplemental Memorandum in (1) Opposition to Plaintiffs' Motions for Sanctions*, Ex. 32, A1171 (stating that BP had a discussion with the Court about whether it could have a court reporter transcribe the sanctions hearing without the presence of Plaintiffs' counsel).

³² *J & H Gibbar Constr. Co., Inc. v. Adams*, 750 S.W.2d 580, 584 (Mo. Ct. App. 1988) (stating that "defense counsel's sworn testimony and Judge Seier's assurances that the communications related only to procedural matters without any discussion concerning the merits of the cause, especially in light of no suggestion to the contrary, serve to dispel

has never argued that the Plaintiffs' communication was about any disputed issue or something on the merits.³³

What is even more absurd is BP's most recent claim that the Plaintiffs "agreed upon the scope of the discovery that BP would answer" "[i]n an attempt to avoid litigating the issue of whether the [10/7/02] Order was invalid."³⁴ This alleged agreement is directly contradicted by a letter from the Plaintiffs a few months after the order, specifically asking that BP comply with the 10/7/02 Order.³⁵ Indeed, BP never claimed

any further question of impropriety."); *VonSande v. VonSande*, 858 S.W.2d 233, 237 (Mo. Ct. App. 1993); *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 820-21 (Mo. Ct. App. 1992) (finding that there was no ex parte conduct where a judge had asked plaintiff's counsel "ex parte" for conclusions of fact and law because it "is simply a procedural matter, not a decision on the merits."). For more discussion of these cases and other authorities, see *Plaintiffs' Memorandum of Law Regarding Alleged Ex Parte Contact*, Ex. 15, A283.

³³ See, e.g., *Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel*, Ex. 17, A333 (describing the contact as "Plaintiffs' counsel went to the judge's chambers, showed the Court the Motion as filed, and pointed out the certificate of attempt to resolve.").

³⁴ *Relator's Brief*, at 30.

³⁵ 1/2/03 *Burr & Forman letter* ¶¶ 10, 13, Ex. 15, A323 (noting that certain documents "were ... the subjects of our motion to compel, which was granted by the

that the order was not effective until November, 2003, more than a year after the order, and ten months after Plaintiffs specifically referenced its requirements.³⁶

Since then, BP has told three different stories. In an *11/10/03 Letter*, BP simply stated that the order was invalid, that it had explained this to Plaintiffs’ counsel, and that it was “willing to engage in good faith negotiations for such requested information.”³⁷ In a later letter, BP stated that Plaintiffs’ counsel “*agreed* to negotiate discovery issues rather than attempting to enforce the alleged ‘order.’”³⁸ Now, BP claims that “the parties agreed upon the *scope* of discovery that BP would answer” suggesting—in direct opposition to its earlier letters—that there was a specific agreement on what would be produced.³⁹ BP’s changing story confirms the truth: *there was never an agreement to not enforce the 10/7/02 Order*. Even if BP was confused about there being such an agreement—which it is not—Plaintiffs made it clear that they had agreed to no such thing the first time BP brought it up.⁴⁰ Ultimately Plaintiffs were forced to file a second

Court,” and asking that BP “[p]lease let us know whether you intend to comply with the Court’s Order and in what time frame.”).

³⁶ *11/10/03 Greensfelder Letter*, at 2, Ex. 17.P, A451.

³⁷ *Id.*

³⁸ *11/17/03 Greensfelder Letter* ¶ 5, Ex. 17.G, A435 (emphasis added).

³⁹ *Relator’s Brief*, at 30 (emphasis added).

⁴⁰ *11/13/03 Burr & Forman Letter*, at 1, at *Respondent’s* A22 (stating in no uncertain terms that Plaintiffs “expect [BP] to be in substantial compliance wit the Court

*Motion to Compel and for Sanctions.*⁴¹ In granting this motion in a second order compelling production, Judge Riley did not allow BP to rely on some alleged unwritten agreement based on a frivolous argument about an ex parte contact with Judge Neill to avoid BP's obligation to produce documents.⁴² The trial court saw BP's conduct for what it was and did not abuse its discretion in making this finding.

c. Before Being Compelled a Second Time to Produce Responsive Documents, BP Produced No E-mails

On February 19, 2004, after BP had failed to produce large categories of documents, including *any* e-mails, Plaintiffs filed their second motion to compel and for sanctions.⁴³ On July 20, 2004, the trial court ordered BP to fully comply with its first order within 30 days.⁴⁴ At this point, nearly two years after the trial court first compelled BP to produce all responsive documents, *BP began searching and reviewing its e-*

Order"); 11/26/03 Burr & Forman Letter ¶¶ 1-5, at Respondent's A24-25. Earlier letters from Plaintiffs specifically requested that BP comply with the order. See, e.g., 11/6/03 Burr & Forman Letter, Ex. 29.VV, A1079-81; 11/10/03 Burr & Forman Letter, Ex. 52, A1578.

⁴¹ See Plaintiffs' Memorandum in Support of Motion to Compel & for Discovery Sanctions (Feb. 19, 2004), Ex. 15, A283.

⁴² 7/20/04 Order, Ex. 19, A512.

⁴³ Plaintiffs' Motion to Compel & for Discovery Sanctions, Ex. 13, A249.

⁴⁴ 7/20/04 Order, Ex. 18, A512.

*mails.*⁴⁵ *Not only had BP produced no e-mails up to this point, it had not even begun reviewing them.* The Plaintiffs had requested responsive e-mails 2 1/2 years before; the trial court had compelled BP to produce them in October, 2002; and Plaintiffs specifically had asked about BP's e-mail production in November, 2003.⁴⁶ But only in August 2004, after being compelled a second time, did BP even begin to *gather* responsive e-mails.

2. BP's Process of Reviewing E-mails Was Grossly Inadequate and Involved Hiding Information from the Plaintiffs and the Court

a. Overview

Six days before BP was required to produce all responsive documents under the court's second order, BP told the Plaintiffs that there were 310,994 e-mails and attachments that corresponded to (or "hit" by) the search terms BP unilaterally imposed.⁴⁷ It argued that it could not review this many e-mails and requested that the Plaintiffs

⁴⁵ *Relator's Brief*, at 31 ("To comply with the July 20, 2004 Order, BP began the process of reviewing ... e-mails").

⁴⁶ *11/6/03 Burr & Forman Letter*, Ex. 30, A1144.

⁴⁷ *8/13/04 Greensfelder Letter*, Ex. 32.N, A1175 ("some 311,000"); *Bowie Affidavit* ¶ 4, Ex.19.1, A525 ("Using the search term list, EED reduced the number of items that needed to be reviewed for relevancy in this case from 501,361 items to 310,994 items.").

eliminate some of the search terms.⁴⁸ BP also asked the trial court for an extension of time.⁴⁹ Plaintiffs argued to the trial court that BP had already dragged its feet for years and deserved no more extensions.⁵⁰ On August 17, 2004, the trial court denied BP's motion for an extension.⁵¹ August 19—the date BP's production was due—came and went, and BP failed to produce any e-mails.⁵²

On August 24, 2004, at another hearing, BP stipulated to the trial court and Plaintiffs that it would produce approximately 300,000 e-mails, which Plaintiffs and the court understood to be the 310,994 e-mails that had “hit” one of BP's search terms.⁵³ On August 31, 2004 without giving Plaintiffs any indication that BP was producing less than

⁴⁸ *Id.*

⁴⁹ *Defendant's Motion for Extension of Time to Comply with Court's Order of July 20, 2004*, Ex. 19, A513.

⁵⁰ Plaintiffs made these arguments at hearing; however, there is no transcript.

⁵¹ 8/17/04 *Order*, Ex. 20, A561.

⁵² BP also failed to produce a number of other highly relevant documents. *See, e.g., Plaintiffs' Reply Memorandum in Further Support of Their Motion for Sanctions* (Dec. 10, 2004), at *Respondent's* A41-48.

⁵³ 8/24/04 *Order*, Ex. 22, A564; *Stipulation regarding Production of Electronic Discovery* (Aug. 24, 2004), Ex. 21, A562.

the full 310,994 items, BP produced only 116,000 e-mails.⁵⁴ Even when Plaintiffs asked BP how many e-mails it produced, it would not say.⁵⁵ When Plaintiffs conducted their own search and realized that BP had only produced 116,000 e-mails, about 1/3 of the e-mails it had promised, they moved for sanctions.⁵⁶ On September 29, 2004—more than a month later—BP produced more e-mails, bringing its total to 300,219, still over 10,000 e-mails short from what BP had stipulated to the trial court that it would produce.⁵⁷

b. BP's Changing Number of E-mails

What BP did not tell the Court or the Plaintiffs was that it was changing its numbers once again. It would later claim that, rather than having had 310,994 e-mails that were responsive to its search terms, the number was only 306,947. In addition, BP also later admitted that it had unilaterally removed 5,873 e-mails solely based upon their subject line and without any review of their content.⁵⁸ BP made these statements only *after* the trial court had ordered production of the full 501,361 e-mails and ordered BP to

⁵⁴ *Dawson Affidavit* ¶ 6, Ex. 29.VVV, A1085; 8/31/04 *Greensfelder Letter*, Ex. 23, A616 (cover letter containing the e-mails).

⁵⁵ 9/1/04 *Burr & Forman Letter* ¶ 5, Ex. 23, A619.

⁵⁶ *Plaintiffs' Motion for Sanctions*, Ex. 23, A565.

⁵⁷ *Hagen Affidavit*, at 2-3 (Nov. 2, 2004), Ex.28.F, A760-62.

⁵⁸ *Id.* ¶ 9, A760; *Relator's Brief*, at 35-36.

“convey to Plaintiff[s] the counting methodology used in calculating the number of emails and attachments initially located (501,361) and the number being provided.”⁵⁹

Back on August 24, 2004, when BP stipulated that it would “produce approximately 300,000 electronic materials on CDs,”⁶⁰ both Plaintiffs and the Court properly understood this to be the 310,994 e-mails BP identified as potentially relevant—minus any that it removed for privilege. For instance, *BP’s Motion for Extension of Time* that it filed days before its stipulation referred only to the “501,361 items” “reduced” “to 310,994 items,” which Bp supported with a sworn affidavit.⁶¹ Rather than repeating this specific number, BP referred to them as the “more than 300,000 e-mails.”⁶² Even the trial court was misled, stating that BP “determined that 310,994 were potentially discoverable” and that BP had agreed to produce the “‘approximately 300,000’ requested emails and attachments as previously ordered.”⁶³

⁵⁹ *Id.* at 3, A706.

⁶⁰ *Stipulation regarding Production of Electronic Discovery*, Ex. 21, A562.

⁶¹ *BP’s Motion for Protective Order and/or Reconsideration of Court’s Order & Motion for Security for Costs and/or Cost-Sharing*, Ex. 19, A517; *Bowie Affidavit* ¶ 4, Ex. 19.1, A525 (explaining BP’s search methodology and stating that “EED reduced the number of items that needed to be reviewed for relevancy in this case from 501,361 items to 310,994 items.”).

⁶² *Id.*, at 1, A513.

⁶³ *10/12/04 Order*, Ex. 27, A705.

But each of the two times that BP sent Plaintiffs CDs of e-mails, it did not tell Plaintiffs how many e-mails it was producing, leading Plaintiffs to believe each time that the full 310,994 e-mails (minus any privileged e-mails) had been produced.⁶⁴ And each time Plaintiffs had to use their own computer technician to determine the number of e-mails that had been produced.⁶⁵ On October 5, 2004, after a motion for sanctions had caused BP to produce a supplement to its e-mail production—bringing its total to 300,219, Plaintiffs complained that BP still had not produced the full 310,994 e-mails.⁶⁶ Rather than explaining, BP did not tell the Plaintiffs or the Court that it had removed 5,846 based on its own subject line review or that it had “recalculated” the total number of “hits” it had previously represented.⁶⁷ In fact, BP has never produced a full list of the subject lines it removed although it has had repeated opportunities to do so. BP likely would never have told the Plaintiffs or the trial court about this removal of e-mails had

⁶⁴ BP first produced 115,885 e-mails on Aug. 31, 2004. *See Dawson Affidavit*, A1084-85. After Plaintiffs filed a motion for sanctions, BP produced additional e-mails on Sept. 9, 2004 bringing its total to 300,219 e-mails. *Hagen Affidavit*, Ex. 28.F, A760-62.

⁶⁵ *See, e.g., Dawson Affidavit*, A1084-85.

⁶⁶ These complaints occurred at a hearing further discussing the *Plaintiffs’ Motion for Sanctions*. There is no transcript of this hearing, but BP has not disputed the fact that it did not mention the 5,800 e-mails it pulled at the hearing.

⁶⁷ *See supra* n.66.

the court not ordered BP on October 12 to “convey to Plaintiff[s] the counting methodology used in calculating the number of emails and attachments initially located (501,361) and the number being provided.”⁶⁸

The following chart provides a convenient summary of BP’s changing numbers with respect to its e-mail production:

501,361	Total number of e-mails BP pulled from the mailboxes of employees it identified as “key players.” ⁶⁹
310,994	Number of e-mails responsive to BP’s search terms. ⁷⁰
306,947	BP’s revised number of e-mails responsive to its search terms. Nearly 3 months later, after the lower Court ordered BP to “convey to Plaintiff the counting methodology used in calculating the number of e-mails” BP submitted another affidavit claiming that the original 310,994 number was only an “estimate” and that the number of items actually responding to a

⁶⁸ *Id.*, A706.

⁶⁹ *Relator’s Brief*, at 31.

⁷⁰ 8/9/04 *Jesse Bowie Affidavit* ¶¶ 1, 4 (“I am employed as a paralegal by BP Using the search term list, EED reduced the number of items that needed to be reviewed for relevancy in this case from 501,361 items to 310,994 items.”).

⁷¹ 11/2/04 *Wes Hagen Affidavit* ¶ 8, Ex. 28.F, A760.

	search term was 306,947. ⁷¹
5,846	The number of e-mails BP removed based on their subject line. ⁷² BP never told the court or the Plaintiffs that it removed these e-mails until after the court ordered it to “convey to Plaintiff the counting methodology used in calculating the number of mails.” ⁷³
301,101	The number of e-mails after BP removed the 5,846 e-mails. ⁷⁴
115,885	The total number of e-mails BP produced after stipulating to produce “some 300,000 e-mails.” ⁷⁵
300,219	The number of e-mails BP ultimately produced after removing 882 privileged e-mails. ⁷⁶
200,260	The number of e-mails at issue in this appeal that BP has not produced. ⁷⁷

⁷² BP never provides the exact number, referring to them as the 5,800, but this number is easily obtained by subtraction, using one of BP’s affidavits. *11/2/04 Hagen Affidavit* ¶¶ 8-9, Ex. 28.F, A760 (stating that there were 306,947 e-mails responsive to a search term and after removing e-mails based on their subject line, the final number was 301,101).

⁷³ *See infra* § III.B.2.

⁷⁴ *11/2/04 Hagen Affidavit* ¶ 9, Ex. 28.F, A760.

⁷⁵ *Dawson Affidavit*, A1084-85.

⁷⁶ *11/2/04 Hagen Affidavit* ¶ 7, Ex. 28.F, A762.

⁷⁷ This number is obtained by subtracting 301,101 from the total 501,361.

**c. Plaintiffs Were Not Provided an Opportunity to Review
BP's Search Terms**

Plaintiffs had no opportunity to suggest search terms or any other criteria for the 195,000 e-mails BP excluded on the basis of its electronic search. BP admits that it made the “decision not to consult Plaintiffs before running the search.”⁷⁸ BP has also said repeatedly that to search the e-mails a second time would cost over \$60,000, and it has demanded that the Plaintiffs pay this cost.⁷⁹ In other words, before BP told the Plaintiffs in August, 2004 *anything* about its electronic production, it had already performed the search and could not re-search the 195,000 e-mails without substantial costs.⁸⁰ Because BP had already run the search and unilaterally decided that the 195,000 e-mails not responding to BP's search terms were irrelevant, BP's August 13, 2004 letter

⁷⁸ *Relator's Brief*, at 74, 79.

⁷⁹ *Relator's Brief*, at 110 (“BP can only conduct a full review ... if BP pays its third-party vendor \$62,000 and incurs even more costs for attorney review time.”); *see also BP's Motion for Reconsideration*, A724, A727 (“The cost of this production [of the remaining 200,000 e-mails] will cost BP upwards of \$62,000.... In addition, by requesting these 200,000 emails, Plaintiffs are attempting to force BP to re-run email searches”).

⁸⁰ BP called the Plaintiffs on August 10, 2004 (having already done the search) and memorialized its phone call in a letter on August 13, 2004. *See 8/13/04 Greensfelder Letter*, Ex. 32.N, A1175.

didn't ask Plaintiffs to add search terms or change the search. Instead, the letter asked Plaintiffs to remove search terms or employees to limit the remaining e-mails.⁸¹

Even in BP's brief before this Court, it makes it clear that as soon as the search was done, BP set aside the 195,000 e-mails that did not "hit" on a search term and only asked Plaintiffs for their input on the remaining 310,994 [a/k/a the 306,947]:

Approximately 307,000 e-mails "hit" on a search term and thus were deemed potentially relevant so that BP would need to review them for privilege and responsiveness. The remaining e-mails and attachments did not contain any search terms. They were therefore deemed irrelevant and non-responsive to Plaintiffs' discovery requests. As a result, BP did not review or produce those approximately 195,000 e-mails and attachments.⁸²

BP now claims that "Plaintiffs were actually given the opportunity to comment on the search terms."⁸³ But BP never invited comment on the 195,000 excluded e-mails, as is made clear by the fact that it did not ask until the money was spent and the exclusion complete. BP's letter only asked for narrowing of the remaining 310,994 e-mails:

Applying the search term list to the employee e-mail resulted in some 311,000 e-mails and attachments. I informed you that it will take anywhere

⁸¹ *Id.*

⁸² *Relator's Brief*, at 33-34.

⁸³ *Id.* at 75.

from 28 to 35 weeks for the attorney team to review the e-mails for responsiveness and privilege.

In an effort to reduce the time and cost to review this voluminous information, I provided you with a CD that contains information from EED that could be used to narrow the search, either by eliminating employee names, search terms, or subject lines. You offered to review BP's organizational charts and determine whether we could eliminate some employees from the e-mail search list.... I would appreciate it if you could continue to review the information I provided you from EED so we can reduce the burden of the production.⁸⁴

In short, nothing in the record indicates that BP gave Plaintiffs the opportunity to add terms to its search. Indeed, the record is clear that BP did not provide any such opportunity, and trial court reasonably reached this factual conclusion.

d. BP's Sloppy Electronic Searches

Not only was BP's e-mail searches unilateral and deceptive, its search terms themselves were incomplete and poorly formulated. First, BP misspelled James Toler.⁸⁵ In response, BP says that "[i]n e-mails, BP rarely refers to any dealer only by his name; rather, dealers are usually referred to by ... an identifying number in order to avoid any

⁸⁴ See 8/13/04 Greensfelder Letter, Ex. 32.N, A1175.

⁸⁵ "Toler" is the correct spelling, not "Tolar." Compare *Petition* ¶ 9, Ex. 1, A4 with *Terms for E-mail Search & Review*, Ex. 28.E, A748.

confusion.”⁸⁶ ***But BP left out at least 36 relevant identifying numbers for the Plaintiffs.***

It left out the location ID or facility number for at least 29 of the plaintiffs’ stations,⁸⁷ and

⁸⁶ *Relator’s Brief*, at 78.

⁸⁷ *See Terms for E-mail Search & Review*, Ex. 28.E, A748-757 (104541 (Pharis Floyd's location ID), 107415 (Randy Crawford's location ID), 100666 (Robert Stringer's location ID - Russell), 100634 (Robert Stringer's location ID - Manchester), 107452 (Robert Stringer's location ID - Highway Dr), 100245 (Tom Chamberlain's location ID), 100637 (Harold Flora's location ID - Florissant), 100255 (Harold Flora's location ID - Lindell), 100338 (Harold Flora's location ID - Kienlen), 104513 (Harold Flora's location ID - Jennings), 107338 (Haltenhof's location ID), 107448 (Jouett's location ID - both stations), 107445 (Lora Lorenz's location ID), 11254 (Lora Lorenz's Facility Number), 100610 (Jim Luebbert's location ID), 107440 (McNamara's location ID - Clayton), 107445 (McNamara's location ID - Lindbergh), 26196 (McNamara's Facility Number - Lindbergh), 107437 (Sheree Montgomery's location ID), 100664 (Jack Overturf's location ID), 100233 (Gilbert Sullivan's location ID), 107455 (Gilbert Sullivan's location ID), 100651 (Rick Taggart's location ID), 100676 (Waters' location ID - Manchester), 100623 (Waters' location ID - Kirkwood), 100678 (Waters' location ID - Grand), 107039 (Watkins' location ID - Hampton), 100249 (Watkins' location ID - Southwest), 100645 (Weber's location ID)).

it used the wrong customer number for several stations.⁸⁸ BP left out *either or both* the SAP and customer number for four plaintiffs.⁸⁹ It also left out the name or address or both for at least five plaintiffs.⁹⁰

BP claims that it is “intimately familiar with the slang, jargon, acronyms and abbreviations it uses, and in fact included many terms and acronyms.”⁹¹ ***But when Plaintiffs reviewed the documents and e-mails BP has produced, they have found that BP did not use a number of key acronyms that would have been at the top of the list of terms Plaintiffs would have searched.*** For instance, Plaintiffs allege that BP gave commission marketers (a type of company owned station) favorable prices, but BP did

⁸⁸ One customer number has two many digits. *Id.* (500053370055). Several others do not have enough digits (50018760, 50005442, 50016634, 50016635).

⁸⁹ *Id.* (90045295 (Haltenhof's SAP Number), 50005458015 (Lora Lorenz's Customer #), 90045306 (Lora Lorenz's SAP Number), 50018862001 (McNamara's Customer # - Lindbergh), 90045306 (McNamara's SAP Number - Lindbergh), 50005598011 (Waters' Customer Number - Manchester), 90044953 (Waters' SAP Number - Manchester)).

⁹⁰ *Id.* (6110 North Broadway (Lora Lorenz's station), 7003 Manchester (Dave Waters' station), Lora Lorenz, Lora Montgomery, Rollan J. Jouett, Inc., Sheree Montgomery, Tom Chamberlain).

⁹¹ *Relator's Brief*, at 75.

not use the relevant acronyms for commission marketers (CM, COCMO, DOCMO).⁹² Plaintiffs also allege that jobbers competed, but BP did not search for jobbers separately at all. BP also did not include any terms for “cost,” even though Plaintiffs have alleged a below cost claim, and it left out a number of other acronyms plaintiffs consider relevant.⁹³ A major issue in the case is BP’s compliance with the Missouri Motor Fuel Marketing Act (“MMFMA”), including whether it set a transfer price, what its transfer price was, etc. But BP did not include MMFMA or MFMA in its search terms. Who in their right mind would write out “Missouri Motor Fuel Marketing Act” in an e-mail? Answer: only two people—the number of hits the spelled out term got out of 501,361 e-mails.⁹⁴ MFMA, MMFMA, or some other abbreviation (perhaps even motor fuel act or

⁹² See *Terms for E-mail Search & Review*, Ex. 28.E, A748-757 (not including CM, COCMO (company owned commission marketer operated), DOCMO (dealer owned commission marketer operated). Plaintiffs are assuming, having not been told one way or the other, that BP used whole word searches and thus a search for “net” would not include network and “COCM “would not include “COCMO.”

⁹³ *Id.* (not including COPS (Company Operations Pricing System), EAS (Economic Assessment System), EMP (dealer Method of Payment), IVR (Internal Investment Rent—formula used for rent that looks at property value), IO (Investor Owner also known as DODO), JOCMO (Jobber Owned, Commission Marketer Operated), NRV (Net Realizable Value)).

⁹⁴ See *List of Hits on Search Terms*, at Respondent’s A27.

motor fuel marketing act) would almost certainly have resulted in far more responsive e-mails). Other relevant terms that were not included were launch plans, launch markets, variable pay, and retail peer groups.

BP repeatedly emphasizes that it applied “428 search terms” and that “[i]n most cases ..., the courts attempted to limit the number of search terms that could be used to a much smaller number.”⁹⁵ But BP’s numbers are deceiving and show the shoddy nature of its search. Of the “428” terms, 13 appear on the list twice⁹⁶ and at least 40 are duplicative of terms that were already searched (e.g., the term “dealer support” is not needed when “dealer” is already searched).⁹⁷ And more than 200 of the terms are the names, addresses, or station number of the plaintiffs in this case. A number of terms just seemed strange. While Plaintiffs did not know enough to rule them out, they are

⁹⁵ See, e.g., *Relator’s Brief*, at 78.

⁹⁶ See *Terms for E-mail Search & Review*, Ex. 28.E, A748-757 (Sidney Turpin, Pharis Floyd, Gilbert Sullivan, 6000 Highway 94 South, 50015906001, 103569, 90045228, 31142 005, 1235 North Grand, 50005050012, 100662, 90044839, 11199005).

⁹⁷ The following terms are broad terms that eliminate the need to search more narrow terms that are too numerous to be listed separately (credit card, dealer, diff, Harold Flora, imaging, margin, market, Michael Turpin, price, pricing, rent, restore, Sidney Turpin, strategy, and zone). *Id.*

certainly not terms plaintiffs would have chosen (e.g., “3%,” “couch,” “line in the sand,” and “PAT Enterprises” (operating a service station in Atlanta)).⁹⁸

In short, BP’s “search term” list—whether intended or not—likely missed thousands upon thousands of responsive e-mails.

e. Examples of BP’s Other Misconduct Warranting a Lack of Trust

BP made other “mistakes” that undoubtedly made the trial court (not to mention the Plaintiffs) wary of trusting it. For instance, BP discovered a large amount of e-mails that it had simply missed and had not been produced.⁹⁹ Also, in BP’s paper production, BP had redacted highly relevant information from a key document—a fact that Plaintiffs only became aware of because BP had inadvertently produced both the redacted paper

⁹⁸ Lest this court think that these terms have some sort of specialized meaning, they had very few hits, suggesting that their meaning is wholly irrelevant here. *See List of Hits on Search Terms*, at *Respondent’s* A27.

⁹⁹ *10/19/04 Greensfelder Letter*, Ex. 29.WWW, A1094 (“We discovered today in the course of preparing for the document deposition that, contrary to our understanding of what was being produced, some old e-mails from the mid to late 1990s from BP’s old e-mail systems were not produced on the CDs created by EED.”); *Relator’s Brief*, at 41 (now admitting that “nearly a quarter of a million older e-mails ... were inadvertently omitted from the original production”).

copy and unredacted electronic version.¹⁰⁰ Finally, even when this Court ordered BP to issue an affidavit “to the best of its knowledge” that its production was complete, BP added additional language to make the affidavit practically meaningless and leave itself plenty of space in the event Plaintiffs found other responsive documents that BP had not produced.¹⁰¹

3. BP’s Ability to Review the E-mails for Privilege

BP also argues that the trial court ordered it to produce privileged documents. But BP had *two years* after being compelled to produce responsive documents to review its e-mails for privilege, but it did not do so.¹⁰² After the Court ordered BP to produce the responsive e-mails, BP has had another *entire year* to conduct such a review, but it has not done so.¹⁰³ In addition, in BP’s *Motion for Reconsideration* of the trial court’s Oct. 12, 2004 order requiring production of the 200,260 e-mails at issue here, BP *asked for an*

¹⁰⁰ Compare Respondent’s A4-6 with Respondent’s A19-21.

¹⁰¹ See Plaintiffs’ Memorandum in Further Support of Their Motion for Sanctions, Ex. 29, A1025-27.

¹⁰² There are two years between the trial court’s 10/7/02 Order, Ex. 9, A203, compelling production and the trial court’s order that BP produce the e-mails at issue here. 10/12/04 Order, A704.

¹⁰³ It is now October 24, 2005, one full year after the 10/12/04 Order, A704.

additional two weeks to review its documents for privilege.¹⁰⁴ More than *three months* later, on February 25, 2005, Judge Riley rejected BP's motion for reconsideration but *gave BP the additional fifteen days it requested* to produce the e-mails, so that BP could conduct a privilege review and produce a privilege log.¹⁰⁵ Even now, under the trial court's order, if this Court rejects BP's Writ Petition, BP will still have the fifteen days it requested to review the documents for privilege.¹⁰⁶ The three years BP has had since it was first compelled is more than enough. Even, so the trial court still generously gave BP the fifteen days it requested to review its e-mails for privilege.

C. The Trial Court Reasonably Rejected BP's Methodology

Arguing against sanctions below, BP unsuccessfully sought the trial court's stamp of approval for the limits it had unilaterally imposed on its own production. BP then sought to have the Missouri Court of Appeals overrule the trial court, which it rightly refused to do. BP now asks this Court to approve these same techniques. But like the other courts before it, this Court should reject BP's one-sided methodology.

- BP did not begin saving e-mails from destruction until a year and a half after the lawsuit was filed.¹⁰⁷

¹⁰⁴ *BP's Motion for Reconsideration*, at 26 (Nov. 2, 2004), Ex. 28, A732.

¹⁰⁵ *2/25/05 Order*, at 3, A1221.

¹⁰⁶ *4/8/05 Order*, Ex. 57, A1623.

¹⁰⁷ *Relator's Brief*, at 29.

- BP never sought the Plaintiffs' consent or advice on what employees it should consider "key players" for preserving, searching, and producing responsive e-mails.¹⁰⁸
- BP never "negotiated" with the Plaintiffs about what search terms it should use.¹⁰⁹ BP admits that it made the "decision not to consult Plaintiffs before running the search."¹¹⁰
- BP's electronic search is poorly formulated and sloppy. Among other mistakes, it leaves out station numbers and other identifying numbers of many Plaintiffs, misspells one Plaintiff's name and leaves out the names of a few others, and misses key acronyms and terms.¹¹¹
- BP made no arrangements for additional searches if new terms were discovered through document review. Indeed BP now claims that an

¹⁰⁸ The trial court gave this failure as one of the reasons why BP's conduct was deserving of sanctions. *10/12/04 Order*, at 2, Ex. 27, A705.

¹⁰⁹ *Zubulake v. UBS Warburg LLC* ("Zubulake V"), 2004 WL 1620866, at *8 (S.D.N.Y. 2004) (stating that "the parties could negotiate a list of search terms to be used in identifying responsive documents").

¹¹⁰ *Relator's Brief*, at 74, 79.

¹¹¹ *See supra* § III.B.2.d.

additional search may only be performed at a substantial cost.¹¹² This is by no means because of the technology involved. Plaintiffs loaded the 300,219 e-mails produced so far onto their own searching technology (for a much lower price) and may conduct numerous searches at no additional charge.¹¹³

- BP never informed the Plaintiffs that any additional searches could only be performed at high additional costs.¹¹⁴
- BP never gave (nor planned to give) Plaintiffs the benefits of its database (even though BP now seeks to charge them for it), and Plaintiffs were required to set up a database at their own expense.
- BP eliminated 5,846 e-mails from their production simply by reviewing their subject line.¹¹⁵ Until the Court ordered BP to produce all 501,361 e-

¹¹² See, e.g., *BP's Motion for Reconsideration*, Ex. 28, at 18, 21, A724, A727 ("[B]y requesting these 200,000 e-mails, Plaintiffs are attempting to force BP to re-run e-mail searches").

¹¹³ BP has never disputed this statement.

¹¹⁴ Plaintiffs made this point below and BP has never denied it. *Plaintiffs' Response to BP's Motion to Reconsider*, at 11, A1123.

¹¹⁵ *BP's Motion for Reconsideration*, at 5, Ex. 28, A711.

mails and to disclose their counting techniques, BP never told the Plaintiffs that it was doing this.¹¹⁶

- BP has never given the Plaintiffs the complete list of subject lines that it thought were irrelevant.¹¹⁷
- BP further “eliminated” over 4,000 e-mails by claiming that initial number of “hits” by its search terms, 310,994, was no longer an accurate number and that the number of hits was actually 306,947.¹¹⁸

BP's searching “protocol” has never been suggested or accepted by a single court, and there is little wonder that the trial court and the Court of Appeals rejected it as inadequate. This Court should similarly reject BP's methods and conduct.

D. Timeline of Events

Nov. 14, 2000 Plaintiffs filed their *Petition*, creating an obligation for BP to begin saving documents.¹¹⁹ BP now admits that it did not even begin to

¹¹⁶ See *supra* nn.58-68. & accompanying text.

¹¹⁷ The sample that BP attaches shows only twenty-three of the thousands of e-mails that BP removed based on subject lines. See A786-89.

¹¹⁸ Compare 8/9/04 *Jesse Bowie Affidavit* ¶ 4 (310,994) with 11/2/04 *Wes Hagen Affidavit* ¶ 8, Ex. 28.F, A760 (306,947).

¹¹⁹ *Petition* (Nov. 14, 2000), Ex. 1, A1.

preserve e-mails from destruction until May, 2002, one and a half years after the *Petition* was filed.¹²⁰

Dec. 5, 2001 Plaintiffs request documents, specifically including “e-mail.”¹²¹

May, 2002 A year and a half after Plaintiffs brought suit and 5 months after filing discovery requests, BP first begins to preserve e-mails from destruction.

Oct. 7, 2002 The court compels BP to produce responsive documents in 5 days.¹²²

Jan. 2, 2003 Plaintiffs write BP a letter noting that certain documents “were ... the subjects of our motion to compel, which was granted by the Court,” and asking that BP “[p]lease let us know whether you intend to comply with the Court’s Order and in what time frame.”¹²³

Nov. 6, 2003 In a letter, Plaintiffs ask BP to produce e-mails “as soon as possible.”¹²⁴

Nov. 10, 2003 BP claims for the first time that the 10/7/02 Order was “ex parte” and states that instead of complying with it, BP is “willing to engage in good faith negotiations for such requested information.”¹²⁵ BP points to no

¹²⁰ *Relator’s Brief*, at 29.

¹²¹ *Plaintiffs’ First Request for Production to Defendants*, Ex. 1, A12.

¹²² *10/7/02 Amended Order*, at 10, Ex. 9, A203.

¹²³ *1/2/03 Burr & Forman letter ¶¶ 10, 13*, Ex. 15, A323.

¹²⁴ *11/6/03 Burr & Forman Letter*, at 2, Ex. 30, A1144.

¹²⁵ *11/10/03 Greensfelder Letter*, at 2, Ex. 17.P, A451. BP’s story keeps changing.

In this letter, it said nothing about an agreement with Plaintiffs not to enforce the order.

document, letter, or e-mail showing Plaintiffs agree to such an offer and does not in this letter—or any later one—explain the scope of discovery allegedly agreed to.¹²⁶ The Plaintiffs quickly respond that there is no such agreement and that the order is fully enforceable.¹²⁷ Even then BP refuses to follow the *Order* and does not move to reconsider it.

Feb. 27, 2004 When BP still refused to produce large categories of documents, including *any e-mails*, Plaintiffs filed a *Motion to Compel and for Discovery Sanctions*.¹²⁸

It added this element in *11/17/03 Greensfelder Letter* ¶ 5, Ex. 17.G, A435, where it said that the parties agreed to negotiate production. Now, BP claims that “the parties agreed upon the scope of discovery that BP would answer” suggesting—in direct opposition to its earlier letters—that there was a specific agreement on what would be produced. *Relator’s Brief*, at 30. BP’s changing story confirms the truth; ***there was never an agreement to not enforce the 10/7/02 Order.***

¹²⁶ *Id.*

¹²⁷ *11/13/03 Burr & Forman Letter*, at 1, at *Respondent’s* A22 (stating in no uncertain terms that Plaintiffs “expect [BP] to be in substantial compliance wit the Court Order”); *11/26/03 Burr & Forman Letter* ¶¶ 1, 2, 3, 5, at *Respondent’s* A24-25 (same).

¹²⁸ *Plaintiffs’ Memorandum in Support of Motion to Compel & for Discovery Sanctions*, Ex. 15, A283.

- July 20, 2004** The trial court “ordered [BP] to provide the discovery ordered by the October 7, 2002 Order” within 30 days.¹²⁹
- Aug. 10, 2004 After the trial court’s July 20, 2004 Order¹³⁰ (nearly 2 years after first being *compelled*), BP first raises the issue of e-mails with Plaintiffs and provides a list of search terms it claims to have already used in a search. BP identified 501,361 e-mails that it collected from employees it claimed were the “key players” and reduced this number to 310,994 by unilaterally applying its list of search terms.¹³¹
- Aug. 13, 2004 BP sent Plaintiffs a letter, asking them to narrow the employees searched or the search terms used.¹³² Plaintiffs were not otherwise consulted and did not take part in any review or search of BP’s e-mails. BP filed a motion for an extension of time to review the e-mails based on its estimated time it would take to review them, apparently not having started any review prior to July of 2004.¹³³

¹²⁹ 7/20/04 Order, Ex. 18, A512.

¹³⁰ *Relator’s Brief*, at 31 (“To comply with the July 20, 2004 Order, BP began the process of reviewing ... e-mails”).

¹³¹ *Id.* at 31-34.

¹³² 8/13/04 *Greensfelder Letter*, Ex. 32.N, A1175.

¹³³ *See Defendant’s Motion for Extension of Time to Comply with Court’s Order of July 20, 2004*, Ex. 19, A513.

Aug. 17, 2004 *The trial court denied BP's Motion for an extension of time.*¹³⁴

Aug. 24, 2004 The trial court granted *Plaintiffs' Second Motion to Compel* covering additional discovery, but BP never makes any attempt to gather e-mails responsive to these additional requests.¹³⁵

Aug., 2004 BP claims that it “reviewed the subject lines and removed approximately 5,800 additional e-mails ... because [it believed] the subject line indicated the e-mail was not relevant.”¹³⁶ BP never told the Plaintiffs or the trial court that it was removing these e-mails until after the trial on October 12, 2004 ordered BP to “convey to Plaintiff the counting methodology used in calculating the number of emails and attachments initially located (501,361), and the number being provided.”¹³⁷ BP also did not tell Plaintiffs or the trial court that it had allegedly miscalculated the original number of its search term hits from

¹³⁴ 8/17/04 *Order*, Ex. 20, A561.

¹³⁵ 8/24/04 *Order*, Ex. 22, A564.

¹³⁶ *Relator's Brief*, at 35.

¹³⁷ 10/12/04 *Order*, at 3, Ex. 27, A706. BP first mentions its removal of these e-mails in its *Motion for Reconsideration*, Ex. 28, A707, filed on November 2, 2004.

310,994 to 306,947.¹³⁸ These “facts” were not disclosed by BP until Nov. 2, 2004.¹³⁹

Aug. 19, 2004 On the date BP’s production is due, BP does not produce any e-mails, failing to comply with the trial court's 7/20/04 and 8/17/04 orders.

Aug. 24, 2004 At a hearing before the trial court, BP still has not produced the e-mails.¹⁴⁰ In open court, BP enters into a stipulation with the trial court and the Plaintiffs, agreeing to produce "approximately 300,000 electronic materials," which Plaintiffs and the court presumed to be the 310,994 e-mails previously identified by BP.¹⁴¹

Aug. 31, 2004 BP produces 115,885 e-mails and attachments, not the 310,994 that it promised to produce. It gives Plaintiffs no indication that it produced anything other than the full 310,994.¹⁴²

¹³⁸ Compare 8/9/04 Jesse Bowie Affidavit ¶ 4 (310,994) with 11/2/04 Wes Hagen Affidavit ¶ 8, Ex. 28.F, A760 (306,947).

¹³⁹ See *supra* n.148.

¹⁴⁰ 8/24/04 Order, Ex. 22, A564.

¹⁴¹ Stipulation Regarding Production of Electronic Discovery (Aug. 24, 2004), Ex. 21, A562.

¹⁴² Dawson Affidavit, A1084-85.

- Sept. 7, 2004 Plaintiffs file a *Motion for Sanctions* based on BP's failure to produce the full 310,994 e-mails and its improper conduct in its e-mail production generally.¹⁴³
- Sept. 10, 2004 BP files a brief in opposition to the sanctions motion and does not once mention that it removed 5,846 e-mails based on their subject lines or that it had miscalculated the number of "hits" at 310,994.¹⁴⁴ BP gives other details of its e-mail search, but leaves these key "facts" out.
- Sept. 29, 2004 According to BP's statistics, it produced another 180,000 e-mails and attachments, bringing its total to 300,219, still nearly 10,000 fewer than the 310,994 that it agreed to produce even if the 882 items listed on its privilege log (that it produced later) are not counted.¹⁴⁵
- Oct. 5, 2004 At a hearing on the e-mail issue and other discovery issues, Plaintiffs produce evidence that BP still has not produced the full 310,994 e-mails that it promised to. BP still never mentions the fact that it withheld over

¹⁴³ *Plaintiffs' Motion for Sanctions*, Ex. 23, A565.

¹⁴⁴ *Defendant's Memorandum in Opposition to the Plaintiffs' Motion for Sanctions*, Ex. 25, A635.

¹⁴⁵ *Hagen Affidavit*, at 2-4 (Nov. 2, 2004), Ex. 28.F, A760-62.

5,846 based on review of their subject lines or miscalculated the number of e-mails at 310,994.¹⁴⁶

Oct. 12, 2004 Ruling on the *Plaintiffs' Motion for Sanctions*, the trial court orders BP to produce all 501,361 e-mails that BP originally determined might be relevant and a privilege log of any e-mails to be excluded.¹⁴⁷ It gives BP 21 days to review the e-mails for privilege.

Nov. 2, 2004 BP was supposed to produce 501,361 e-mails but fails to comply. BP files its *Motion for Reconsideration of Court's Order of October 12, 2004*. BP informs Plaintiffs for the first time that it withheld e-mails based on its review of their subject lines and had allegedly overstated the original number of e-mail hits, 310,994, by over 4,000 e-mails.¹⁴⁸ As alternative relief, BP asks for an additional “two weeks from the date of such an order in which to produce the additional 200,000 e-mails, as it will take such amount of time to review the emails.”¹⁴⁹

¹⁴⁶ There is no transcript of this hearing, but BP has not disputed the fact that it did *not* mention the 5,846 e-mails it pulled at the hearing.

¹⁴⁷ 10/12/04 *Order*, A704.

¹⁴⁸ *BP's Motion for Reconsideration*, at 5 (Nov. 2, 2004), Ex. 28, A707.

¹⁴⁹ *Id.* at 26, Ex. 28, A732.

Feb. 25, 2005 The trial court rejects *BP's Motion for Reconsideration*, but grants it the alternative relief of 15 additional days to produce the e-mails and a privilege log for any e-mails withheld.¹⁵⁰

March 7, 2005 BP moves to stay the trial court's order pending resolution of writ.¹⁵¹

March 14, 2005 The trial court issues an order staying its earlier orders pending appeal and giving BP an additional "fifteen (15) days from the date of the final court order in which to comply with the Court's Order[s]."¹⁵²

March 24, 2005 BP's *Writ Petition* is rejected by the Missouri Court of Appeals ten days after it was filed and two days after Plaintiffs file their *Suggestions in Opposition*.¹⁵³

April 7, 2005 BP files a *Writ Petition* with this Court and moves to stay the lower court's orders pending resolution of writ.¹⁵⁴

April 8, 2005 Judge Riley stays the e-mail orders until 15 days after this Court rules.¹⁵⁵

¹⁵⁰ 2/25/05 Order, at 3, Ex. 31, A1221.

¹⁵¹ *Defendant's Motion for Stay of Court's October 12, 2004 & February 25, 2005 Orders Pending Appeal* (March 7, 2005), Ex. 43, A1425.

¹⁵² 3/14/05 Order, Ex. 51, A1551.

¹⁵³ See 3/24/05 Order, Ex. 55, A1615.

¹⁵⁴ *Defendant's Motion to Stay Court's Orders of October 12, 2004 and February 25, 2005 Pending Appeal in the Missouri Supreme Court*, Ex. 56, A1616.

IV. ARGUMENT

A. Overview

The five points BP relies upon in its brief do not address the trial court's sanctions order at all, so these points do not provide the correct framework for this Court's analysis. Accordingly, this brief uses a different framework to address each of BP's five points and to add some points that BP missed. Section IV.B (pp. 62-109) explains why the lower court's order is justifiable as a sanctions order against BP for its wrongful discovery conduct. In the process, the section explains in great detail why BP's arguments about relevance (Point I) are mistaken. Towards the end of the section (pp. 99-**Error! Bookmark not defined.**), it explains why BP's arguments about burdensomeness (Point III) and cost-shifting (Point V) are wrong. Section IV.C.1 (pp. 109-117) addresses BP's arguments about privileged information (Point II). Because the trial court never ordered BP to produce privileged materials, this issue is almost completely factual and is best discussed separately from the discussion of the reasonableness of sanctions imposed upon BP. Section IV.C.2 (117-123) addresses BP's arguments about confidentiality and privacy (Point IV). Like the issue of privilege, the trial court's order fully protected the interests of BP and its employees to confidentiality and privacy.

¹⁵⁵ *4/8/05 Order*, at 1, Ex. 57, at 1623.

B. The Sanctions Imposed by Judge Riley Were Not an Abuse of Discretion and BP's First Point About Relevance Is Inapplicable Here

1. Abuse of Discretion Is the Standard of Review for an Order Granting Sanctions

Rule 61.01 of the Missouri Supreme Court Rules provides a court with broad discretion to impose sanctions “mak[ing] such orders in regard to the failure as are just” where “a party ... timely files objections that are thereafter overruled and the documents and things are not timely produced.”¹⁵⁶ The Missouri Supreme Court has emphasized the broad discretion that the trial court has in imposing sanctions:

The trial court has broad discretion to control discovery. *This discretion extends to the trial court's choice of remedies in response to the non-disclosure of evidence or witnesses during discovery.* Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion.¹⁵⁷

¹⁵⁶ *Mo. Sup. Ct. R.* 61.01.

¹⁵⁷ *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. 1997).

There are two requirements before a court may issue sanctions. First, the Court must find a discovery violation.¹⁵⁸ Second, cases have found that the court must find prejudice.¹⁵⁹ “A trial court is vested with wide discretion in determining if prejudice exists as the result

¹⁵⁸ *Mo. Sup. Ct. R.* 61.01.

¹⁵⁹ *See, e.g., Karolat v. Karolat*, 151 S.W.3d 852, 858 (Mo. Ct. App. 2004); *State ex rel. Missouri Highway and Transp Com'n v. Pully*, 737 S.W.2d 241 (Mo. Ct. App. 1987). Additionally, courts impose a third requirement of deliberate disregard before issuing the most severe sanction of default judgment. *Norber v. Marcotte*, 134 S.W.3d 651, 660 (Mo. Ct. App. 2004) (“Entering a default judgment for failing to tender discovery, though drastic, is appropriate when a party has shown contumacious and deliberate disregard for the trial court's authority.”) (citations omitted). As discussed below in section IV.B.5.b, Plaintiffs have proven this element as well even though it is not required for the sanction that the trial court imposed.

of improper actions used in discovery.”¹⁶⁰ The Court must also look at the entire history in determining whether or not there is prejudice.¹⁶¹ As Missouri courts have put it:

The trial court is justified in applying sanctions where the record reveals a long course of failure to produce documents, or the facts show a pattern of repeated disregard to comply with discovery....¹⁶²

2. Overview

The trial court’s sanctions order is clearly not an abuse of discretion. First, BP violated its *discovery obligations* in too many ways to count. It engaged in repeated delays, ultimately requiring multiple court orders before it even produced a single e-mail.

¹⁶⁰ *Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 235 (Mo. Ct. App. 1981) (citing *Bethell v. Porter*, 595 S.W.2d 369, 377 (Mo. Ct. App. 1980); *Hilmer v. Hezel*, 492 S.W.2d 395, 397 (Mo. Ct. App. 1973)); *see also McManemin v. McMillin*, 157 S.W.3d 304, 305 (Mo. Ct. App. 2005) (“The existence of prejudice ... rest[s] primarily in the sound discretion of the trial court.”) (citations & internal quotations omitted).

¹⁶¹ *McManemin v. McMillin*, 157 S.W.3d 304, 305 (Mo. Ct. App. 2005) (“Although Appellant graces us only with the facts that occurred on or after February 26, 2003, the events occurring prior to that time are significant in an analysis of the reasonableness of the trial court's decision to strike Appellant's pleadings.”)

¹⁶² *Norber v. Marcotte*, 134 S.W.3d 651, 660 (Mo. Ct. App. 2004) (citations omitted); *see also Dobbs v. Dobbs Tire & Auto Centers, Inc.*, 969 S.W.2d 894, 899 (Mo. Ct. App. 1998) (stating the same thing and upholding striking of pleadings).

In addition, BP's electronic search for e-mails did not follow the protocol of any court in the country and was a violation of its obligation to search for and produce relevant e-mails.

Second, the trial court did not abuse its "wide discretion" in determining that the Plaintiffs were *prejudiced*. BP has driven up the costs of this litigation to monumental degrees through its discovery violations and its flouting of court orders. It has fought Plaintiffs at every turn on issues that could not reasonably be disputed. These gross discovery violations have forced the court to push back trial dates and have made it extremely difficult and costly for Plaintiffs to pursue their case on the merits.

Finally, the *sanction imposed* by the trial court —production of the 200,260 non-privileged e-mails—was also not an abuse of discretion. The trial court reasonably concluded that the 200,260 non-privileged e-mails were potentially relevant because BP had never conducted adequate searches of them. The court further found that BP's repeated delays and refusals to cooperate suggested that the only way of ensuring that responsive e-mails were produced would be to require production of the full 200,260 non-privileged e-mails. This was doubly true because BP violated court orders, violated its own stipulation, and repeatedly provided the trial court with misinformation, making BP unreliable, uncontrollable, and untrustworthy. This sanction is not unduly burdensome because the cost (which BP claims is \$62,000—a disputed number since Plaintiffs were able to perform similar searches with 300,000 e-mails for a much lower cost) is a direct result of BP not adequately conducting its e-mail search. In addition,

courts do not impose cost-shifting where the money is for a privilege review—as BP claims here.

Because the trial court’s order to produce the 200,260 e-mails was a sanctions order, BP’s discussion of relevance (Point I, pp. 56-82) is misguided and inapplicable. The e-mails were potentially relevant, and BP’s failure to cooperate with discovery made production of the full 200,260 an appropriate sanction for BP’s misconduct. There may be some irrelevant e-mails in the 200,260 (neither BP nor the Plaintiffs know that for sure), but BP’s actions in evading court orders and improperly conducting searches made the court’s sanction an appropriate—if not downright lenient—remedy.

3. BP Violated Its Discovery Obligations, the Trial Court’s Orders, and BP’s Own Stipulation to the Court

a. BP Simply Did Not Produce E-mails Within the Time Limits Repeatedly Set for It

“There is no doubt that untimely compliance with a discovery order after or even before the filing of a motion for sanctions does not prohibit the imposition of appropriate sanctions for noncompliance with the order.”¹⁶³ As the facts above make clear, BP committed major discovery violations through its delay in producing e-mails. Among other violations:

¹⁶³ *State ex rel. Ramblin' Int'l, Inc. v. Peters*, 711 S.W.2d 597, 602 (Mo. Ct. App. 1986).

- **After discovery requests are served** Despite BP's admitted obligation to preserve electronic information BP did not even begin to preserve e-mails until May, 2002, nearly one and a half years after the complaint was filed—a fact BP only made Plaintiffs aware of in its appellate briefs.¹⁶⁴
- **One Court Order—One year after discovery requests are served** BP did not even begin producing *any documents* or e-mails until after the trial court granted the *Plaintiffs' [First] Motion to Compel*.¹⁶⁵
- **Two Court Orders—Two years, eight months after discovery requests are served** Even after the trial court ordered BP to produce responsive documents and Plaintiffs specifically asked BP about e-mails, BP does not even begin collecting or producing responsive e-mails until after the court granted a second motion to compel and for sanctions.¹⁶⁶
- **Three Court Orders & One Stipulation—Three years, nine months after discovery requests are served** After the trial court issued a *third* order, BP finally stipulated in open court that it will produce the 310,994 e-mails that responded to a search term—minus any it reviews for privilege. Instead of keeping this promise, BP produced only 115,885 e-mails and

¹⁶⁴ *Relator's Brief*, at 29.

¹⁶⁵ *See supra* § III.B.1.a.

¹⁶⁶ *See supra* § III.B.1.b-c.

attachments—one third of the number it promised the Plaintiffs and the court.¹⁶⁷

- **Three Court Orders & One Stipulation—Three years and nine months after discovery requests are served** BP removed e-mails based on their subject line without telling either the Plaintiffs or the trial court despite repeated opportunities to do so. It never gave Plaintiffs or the court a full list of the subject lines it removed. It also “recalculated” the number of e-mails that responded to search terms by reducing that number by 4,047 e-mails. Only after the court ordered BP to give an accounting for the e-mails it produced and withheld on October 12, 2004 did this unauthorized removal and recalculation come to light.¹⁶⁸ As a result, BP never produced the 310,994 e-mails that it promised the court.
- **Four Court Orders—Three years and nine months after discovery requests are served** The Court grants Plaintiffs’ Motion to Compel on additional request for production, covering e-mail, and BP makes no efforts to gather e-mails responsive to this request—it still has not done so.¹⁶⁹

¹⁶⁷ See *supra* § III.B.2, nn.47-56 & accompanying text.

¹⁶⁸ See *supra* § III.B.2, nn.57-68 & accompanying text.

¹⁶⁹ See *supra* nn.134-135 & accompanying text.

In short, the trial court's sanctions against BP were based on BP dragging its feet for four years, violating four orders and ultimately producing 9,893 e-mails less than it promised both the Plaintiffs and the Court.¹⁷⁰

b. BP's Method of Gathering E-mail Violated Its Discovery Obligations

i. Overview

In addition to BP's significant delays and violations of court orders in producing e-mails, BP's process for reviewing and producing e-mails was not an accepted practice and was appropriately rejected by the trial court. According to courts and commentators, reviewing documents by hand is the accepted approach unless the parties agree otherwise or the court orders an electronic search. In this case, without petitioning the court or negotiating with the Plaintiffs, BP ran its own electronic search. Its search misspelled the name of one plaintiff; did not include more than thirty location numbers, facility numbers, and customer numbers for the plaintiffs and their stations; left out the names of some plaintiffs; and left out a host of key search terms. By its own admission BP made the "decision not to consult Plaintiffs before running the search."¹⁷¹ By the time BP told Plaintiffs about the search, it was already run, and BP could not rerun the search with

¹⁷⁰ 9,893 includes 5,846 withheld based on their subject lines and 4,047 that BP claimed were not responsive after it "recalculated" the number of e-mails responding to a search term.

¹⁷¹ *Relator's Brief*, at 74, 79.

new terms without allegedly spending more than \$60,000, which it demanded that Plaintiffs pay.¹⁷² In addition, without telling Plaintiffs or the Court, BP removed 5,846 e-mails that *responded to a search term* solely on the basis of the e-mail's subject line. *No court has ever approved such a subject-line elimination, and it almost certainly resulted in the elimination of relevant e-mails.* BP's search was also questionable because BP represented to the court in sworn testimony that it had 310,994 "hits" and then changed this number to 306,947 without any explanation.¹⁷³ And BP never would have told the Court about its subject line removal or its "recalculation" had the Court not ordered it to account for the full 501,361 e-mails. Under any court's standard, BP's "search methodology" was a gross violation of its discovery responsibilities.

¹⁷² *Relator's Brief*, at 110 ("CP can only conduct a full review ... if BP pays its third-party vendor \$62,000 and incurs even more costs for attorney review time."); *see also BP's Motion for Reconsideration*, at 18, 21, A724, A727 ("The cost of this production [of the remaining 200,000 e-mails] will cost BP upwards of \$62,000.... In addition, by requesting these 200,000 emails, Plaintiffs are attempting to force BP to re-run email searches").

¹⁷³ *Compare 8/9/04 Jesse Bowie Affidavit ¶ 4 (310,994) with 11/2/04 Wes Hagen Affidavit ¶ 8, Ex. 28.F, A760 (306,947).*

**ii. Electronic Searches Are Allowed Only by
Permission of the Court or Agreement by the
Parties**

(a) Case Law

BP admits that the same “rules apply to electronic discovery just as they apply to paper discovery.”¹⁷⁴ The *Electronic Discovery Primer for Judges* explains that ***a party must “examin[e] each document” unless the “parties ... stipulate[] or the court ... order[s] that performing a key word search ... is desirable and sufficient.”***¹⁷⁵ Every court addressing the issue has confirmed this view. In *Dodge v. Riley*, the court affirmed an injunction “requiring [defendants] to allow a court-appointed expert ... to perform automated searches of the evidence ***under guidelines agreed to by the parties or***

¹⁷⁴ *Relator’s Brief*, at 61; *see also Daewoo Elecs. Co. v. United States*, 650 F. Supp. 1003, 06 (Ct. Int’l Trade 1986) (“It would be a dangerous development in the law if new techniques for easing the use of information became a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms.”).

¹⁷⁵ David K. Isom, *Electronic Discovery Primer for Judges*, 2005 Fed. Cts. L. Rev. 1, II.J.7 (2005), at *Respondent’s* A278 (emphasis added) (discussing the appropriateness of a key word search for a privilege review).

established by the court.”¹⁷⁶ In *Zubulake V*, the Court explained that “When the opposing party propounds its document request, *the parties could negotiate a list of search terms* to be used in identifying responsive documents”¹⁷⁷ Presumably, like any other discovery dispute, if negotiations fail, the parties petition the court to intervene. In *Alexander v. FBI*, the court explained that “Plaintiffs are able to pursue *discussions* with the Department of Justice *regarding targeted and appropriately worded searches* of backed-up and archived e-mail and deleted hard drives for a limited number of individuals.”¹⁷⁸ In *J.C. Associates*, the Court asks the defendant *to present to the court the feasibility of doing electronic searches*, and the Court presents two possible search terms that might gather relevant material.¹⁷⁹ In *Proctor & Gamble Co. v. Haugen*, the Court allows the Plaintiff to search the defendant’s “electronic database with 25 search terms, *which [the plaintiff] was to propose.*”¹⁸⁰ The Court, however, monitored these

¹⁷⁶ *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley*, 105 Cal. Rptr. 2d 385, 388 (Cal App. 2003) (emphasis added).

¹⁷⁷ *Zubulake v. UBS Warburg LLC* (“*Zubulake V*”), 2004 WL 1620866, at *8 (S.D.N.Y. 2004) (emphasis added).

¹⁷⁸ *Alexander v. FBI*, 188 F.R.D. 11, 18 (D.D.C 1998) (emphasis added).

¹⁷⁹ *J.C. Assocs. v. Fidelity & Guaranty Ins. Co.*, 2005 WL 1570140, at *2 (D.D.C. 2005).

¹⁸⁰ *Proctor & Gamble Co. v. Haugen*, 179 F.R.D. 622, 632 (D. Utah 1998).

search terms to make sure that they did not request irrelevant information.¹⁸¹ Other cases similarly allow the requesting party, agreement by the parties, or the court to choose the search terms.¹⁸²

The Fourth Amendment search and seizure cases that BP cites confirm the rule that the producing party does not get to unilaterally impose search terms. In *3817 W. West End*, the court held that “the government [the *requesting party*] may tailor a search to target on the documents which evidence the alleged criminal activity” using “computer technology.”¹⁸³ Other fourth amendment cases cited by BP follow the same rule.¹⁸⁴

¹⁸¹ *Id.*

¹⁸² *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 570 (N.D. Ill. 2004) (allowing Plaintiffs, the requesting party, to initially chose 98 search terms to search a sampling of back-up tapes in a routine employment case, and later allowing each party to choose four terms from the Plaintiffs’ list to search the remaining back-up tapes); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071, at *1 ¶ 3 (Fla. Cir. Ct. 2005) (using 29 “specified search terms” apparently chosen by the court).

¹⁸³ *In re Search of 3817 W. West End, First Floor Chicago, Illinois 60621*, 321 F. Supp. 2d 953, 959 (N.D. Ill. 2004). Since *3817 W. West End* involves a search warrant in a criminal context (and not civil discovery), it is not exactly analogous to the situation here, but BP cites it, so Plaintiffs address it. BP clearly did not follow the method proposed by this court since it would have meant that the Plaintiffs—the requesting party—would have chosen the search terms without the input of BP at all.

BP argues that “[a]s the producing party,” “BP had every right to determine which terms it thought would retrieve responsive documents on its own without input from the Plaintiffs.” It claims that “[n]umerous courts have held that the producing party should be in charge of its own production.”¹⁸⁵ But BP’s citations to support this point do not stand for what it claims. BP cites two *Zubulake* decisions, but they must be understood in the context of the *Zubulake* Court’s later decision—from the same judge—that “*the parties could negotiate a list of search terms* to be used in identifying responsive documents.”¹⁸⁶ *Zubulake I*, in the passage quoted by BP, is merely explaining the capability of the searching system, not suggesting how the search should be run or who should determine the search terms.¹⁸⁷ Even if BP contends that it was an actual

¹⁸⁴ *In re John Doe Proceeding*, 272 Wis. 2d 208, 239 n.18, 680 N.W.2d 792, 807 n.18 (2004) (“Because the records sought are computer records, a key word search **by the requesting party**] would not have been too difficult ... [and] may have been helpful”); *Commonwealth v. Hinds*, 768 N.E.2d 1067, 1071-73 (Mass. 2002) (allowing search of files because the search was limited by key terms [by the **requesting party**] and was thus “content based”). For the relevancy of these cases *see supra* n.183.

¹⁸⁵ *See Relator’s Brief*, at 74.

¹⁸⁶ *Zubulake v. UBS Warburg LLC* (“*Zubulake V*”), 2004 WL 1620866, at *8 (S.D.N.Y. 2004) (emphasis added).

¹⁸⁷ *Zubulake v. UBS Warburg LLC* (“*Zubulake I*”), 217 F.R.D. 309, 315 (S.D.N.Y. 2003) (“The optical disks are easily searchable using a program called Tumbleweed.

suggestion for a search, it was the Court, not the producing party, that mentions the specific search term.

In the passage BP refers to in *Zubulake III*, the court was explaining why “the responding party [here, BP] should *always* bear the cost of reviewing and producing electronic data once it has been converted into an accessible form.”¹⁸⁸ The reason the responding party must always bear the cost of the review is that it “unilaterally decides on the review protocol.”¹⁸⁹ By “review protocol,” the court meant that the party could choose between either “reading every word of every document [or] conducting a series of targeted key word searches.”¹⁹⁰ The court said nothing about *who* would choose the

Using Tumbleweed, a user can simply log into the system with the proper credentials and create a plain language search. Search criteria can include not just “header” information, such as the date or the name of the sender or recipient, but can also include terms within the text of the e-mail itself. For example, UBS personnel could easily run a search for e-mails containing the words “Laura” or Zubulake” that were sent by Chapin, Datta, Clarke, or Hardisty.”).

¹⁸⁸ *Zubulake v. UBS Warburg LLC* (“*Zubulake III*”), 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

search terms if an electronic search was performed; the protocol was the *type of review done*, not the specific search terms used if an electronic search was performed.¹⁹¹

BP also cites *Wiginton*, but it said *nothing* about using keyword searches to produce responsive e-mails. Instead, it said that to *preserve* e-mails, the defendant could conduct broad electronic searches.¹⁹² One might imagine that in a simple “sexual harassment” case such as *Wiginton*, it would be possible to do broad electronic searches to preserve all potentially relevant e-mails and then later negotiate more narrow searches or perform a hand review to decide what responsive documents to produce.¹⁹³ In this case, given the complex nature of the Plaintiffs’ claims, it is doubtful that BP could have properly retained documents merely by doing a unilateral word search in the first place—if it had done so. In any case, it is not BP’s document retention that is at issue; it is BP’s document search, and no case allows the responding party to unilaterally do a document search to limit its production of responsive documents.

BP also cites the concurring opinion in *In re John Doe*, but this opinion does not say that the producing party should choose the search terms—a statement that would

¹⁹¹ *Id.*

¹⁹² *Wiginton v. Ellis*, 2003 WL 22439865, at *6 (N.D. Ill. 2003).

¹⁹³ *Id.*

contradict the majority who said the requesting party should choose terms.¹⁹⁴ The concurring opinion simply makes the general statement that “responding parties are in the best position to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data; and *trial courts may need to be more active in managing electronic discovery ... especially when the parties cannot agree about the scope of the request for electronic information.*”¹⁹⁵ Like all the other authority listed above, the *John Doe* concurring opinion suggested that the parties first “agree about the scope of the request” and then have the trial court intervene if no agreement is reached.

Even the secondary sources cited by BP support this approach. The Sedona Principles specifically say “[i]n appropriate circumstances, litigants may find it useful *to discuss specific selection criteria, including search terms, to be used in searches of electronic data for production.*”¹⁹⁶ Bennett, the other secondary source cited by BP, also confirms the importance of agreement from the court or the opposing party:

¹⁹⁴ Compare *In re John Doe Proceeding*, 272 Wis. 2d 208, 245, 680 N.W.2d 792, 810 (2004) (concurring opinion) with *id.*, 272 Wis. 2d at 239 n.18, 680 N.W.2d at 807 n.18 (majority opinion).

¹⁹⁵ *Id.*, 272 Wis. 2d at 245, 680 N.W.2d at 810 (concurring opinion) (emphasis added).

¹⁹⁶ *The Sedona Principles: Best Practices Recommendations Principles for Addressing Electronic Document Production*, at 39, Ex. 42, A1400 (emphasis added).

Development of search terms, moreover, might be done *in conjunction with the plaintiff's attorney* (perhaps with the direction of the court). In essence, the company would describe its electronic records system, and the search method it has used (or proposes to use), and *would invite opposing counsel to suggest any additional search terms* required to capture and preserve essential information.¹⁹⁷

Other secondary sources hold similarly.¹⁹⁸

¹⁹⁷ Steven C. Bennett, *E-Discovery by Keyword Search*, 15 No. 3 Prac. Litigator 7, 11 (2004), Ex. 61, A1812 (emphasis added).

¹⁹⁸ American Bar Association, *Amendments to Civil Discovery Standards* § VIII, Standard 31(a)(xi) and comment (Aug. 2003), Ex. 62, A1830-33; Ronald J. Hedges, *Discovery of Digital Information*, SK094 ALI-ABA 231, 249-50 (2005), at *Respondent's* A311 (“If the parties intend to employ an electronic search to locate relevant electronic documents, the parties ... shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched The parties also shall reach agreement as to the timing and conditions of any additional searches which may become necessary in the normal course of discovery.”).

**(b) Logic and Common Sense Compel the
Unanimous Rule of Only Applying Keyword
Searches Where There Is Agreement by the
Parties or an Order by the Court**

BP argues that it “had every right to determine which terms it thought would retrieve responsive documents on its own without input from Plaintiffs.”¹⁹⁹ As shown from the cases above, BP has no such right. Furthermore, such a system would create no incentives for a party to create a search that would produce all responsive documents. For instance, under this scenario, a party could simply put together a sloppy list of search terms that (1) omits the name of the plaintiff; (2) omits identifying numbers for the plaintiff; (3) misspells the name of the plaintiff; or (4) omits key terms relating to one of the plaintiff’s theories of liability. The party could seek no input and then claim that additional searches could be done only at great cost. It could further wait to inform the court and the plaintiff of its search methodology until after the searches were done. Lest the Court think this is a mere worst case scenario, BP has done all of these things here.²⁰⁰

Any attorney who has performed research using Westlaw, Lexis-Nexis or some other search engine knows that electronic searching is not a simple task. It requires careful and often creative wording of search terms, adding new search terms as the first ones fail or as documents reveal additional possible terms. Only the party seeking the

¹⁹⁹ *Relator’s Brief*, at 74.

²⁰⁰ *See supra* § III.B.2.c.

documents (or research) has the incentive to engage in careful thinking and craft a search that will be successful in producing the needed documents. It is one thing to trust opposing counsel to review documents by hand for responsiveness; it is quite another to trust opposing counsel to carefully craft search terms that will cover the precise material needed. Just as plaintiffs don't have to trust defendants to research case law for them, they should not have to trust them to come up with electronic searches for documents.

As this Court is certainly aware, any electronic search will miss a number of items and documents that a manual search will not. This is doubly true with e-mail. In e-mail, people tend to abbreviate, they tolerate misspellings, and they use slang or jargon for terms that might have more formal words in a letter or a memo. For instance, "James M. Tolar," one of the Plaintiffs, is a search term used by BP, but if his name is misspelled in an e-mail (for example, "James M. Tolir") it would not be picked up. He would also be missed if the sales reps referred to him by a nickname they created, such as "Tole." Another example is that several phrases use the word "channel," such as "channel of trade," "channel conversion," and "channel mix." But if channel were abbreviated "chnl," or conversion were abbreviated "convrs," these terms would be missed.

Given the great need to carefully craft electronic searches, it is important that the requesting party—supervised by the court—have a key role in choosing the search terms. If the requesting party agrees to the search terms, it will be likely to very carefully choose the terms used. While some responsive documents will almost certainly still be missed, at least the requesting party had a role in its own fate.

Finally, it is worth noting that in complicated cases, the ability to do multiple searches after new terms are discovered is extremely important. Many search companies allow you to do these searches without charge, including the e-mail database the Plaintiffs are currently using to review the e-mails BP produced. If the trial court had been able to set the protocol for BP's search, Plaintiffs would have asked that the search terms be agreed upon by the parties and that a company be used that could do multiple searches for no additional cost, so that when later terms emerged, they could be searched as well.

iii. No Subject Line Review Is Allowed

Without going over the extensive case law listed above in section IV.B.3.b.ii(a), every case allowing an electronic search assumes or holds that all non-privileged documents responding to the search will be produced or reviewed in full by hand.²⁰¹ No court has even considered—much less authorized—BP's actions in removing e-mails that respond to an electronic search based solely on its subject line.

²⁰¹ See, e.g., *Zubulake V*, 229 F.R.D. at 432 (stating that counsel would be obliged to “review documents that came up as ‘hits’ on the second, more restrictive search,” meaning a full “review” not a subject-line review); *J.C. Assocs.*, 2005 WL 1570140, at *2 (same); *Coleman (Parent) Holdings, Inc.*, 2005 WL 679071 ¶ 3, at *1 (same); *Proctor & Gamble Co.*, 179 F.R.D. at 632 (assuming that all documents responding to search terms will be produced).

The reasons why no court has allowed a subject line search are obvious. Unlike formal correspondence, e-mails frequently touch on subjects that are unrelated to other parts of the e-mail. For example, in response to an e-mail about lunch, someone might reply and say that lunch on Tuesday is fine, that they wanted to talk about BP's program to eliminate the dealers, and that the final phase—pricing dealers at levels they could not possibly survive at—is now in place. This e-mail would contain the subject line “Re: Lunch,” but it would obviously be relevant to the case. This is a hypothetical e-mail, but the point is that the substance of e-mails may not reflect their subject headings. Many people also reply to a previous e-mail received days or weeks earlier merely to ensure that they have the correct e-mail address of the recipient. In these cases, the subject line will have little or no relevance to the content of the e-mail.

A subject-line removal is even more problematic when the party removing e-mails does not give a full list of the subject lines it removed to the opposing party. This failure to disclose the subject lines removed suggests that BP may have a hard time defending some of the subject lines it removed. This action keeps the Plaintiffs and the court from an independent evaluation of whether the subject line removal was fair. BP has given no reason for its failure to include the full list.

**iv. Applying the Above Case Law, BP Did Not Follow
the Rules for Electronic Searches**

**(a) Plaintiffs Were Not Provided an Opportunity
to Review BP's Search Terms**

Plaintiffs set out in detail above in § III.B.2.c the evidence that they were given no role in selecting search terms. Without repeating this evidence—accepted by the trial court—Plaintiffs note that BP admits that it made the “decision not to consult Plaintiffs before running the search.”²⁰² Only after the search was run and the money was spent did BP notify the Plaintiffs about it. At this point it was too late to do a new search—which BP never suggested as an option—without allegedly spending a costly sum which BP now argues the Plaintiffs should pay.

**(b) The Searches Themselves Were Not Well
Formulated**

Plaintiffs set out in detail above in § III.B.2.c the shoddy nature of BP's searches. While there is no need to repeat these in detail here, a summary is useful. BP admits that it uses identifying numbers as its primary way of referring to Plaintiffs in e-mails, yet it left out more than thirty such identifying numbers for the plaintiffs. It also left out and misspelled plaintiffs names. And it missed key terms and acronyms that clearly would have pulled up responsive e-mails. To use just one example here, rather than using the common abbreviation for Missouri Motor Fuel Marketing Act (MMFMA or MFMA), BP

²⁰² *Relator's Brief*, at 74, 79.

used the whole term; not surprisingly, it was only spelled out in whole in two e-mails—missing a large number where it was likely abbreviated. For more examples with citations, the Court should consult the discussion above in §III.B.2.c. In short, BP’s “search term” list—whether intended or not—likely missed thousands upon thousands of responsive e-mails. There should be little surprise that the court rejected its one-sided methodology.

**(c) BP Removed E-mails Based on Their Subject
Line**

Even more egregiously, in BP's *Motion for Reconsideration*, BP informed Plaintiffs and the trial court for the first time that "BP removed a number of emails that had subject lines that were clearly not responsive to the Plaintiffs' requests."²⁰³ If BP really thought that these subject lines were irrelevant, it would have produced a full list of the subject lines it removed. Instead, ***BP has produced a list of only twenty-three of the thousands of subject lines it removed.***²⁰⁴ BP now claims that its failure to tell the trial court or the Plaintiffs about its removal of e-mails based on their subject line was an innocent mistake. But this removal was unauthorized by the trial court or by any court, rule, or statute. And BP's actions suggest that it was never intending to tell the court or

²⁰³ BP's *Motion for Reconsideration*, at 5, A711; see *supra* n.58-68 & accompanying text.

²⁰⁴ See A786-89.

the Plaintiffs about this removal. BP made this revelation only after the trial court ordered it to do so.²⁰⁵

It is not hard to understand why the Court thought BP was deserving of sanctions for this behavior.

4. The Plaintiffs Were Prejudiced

“A trial court is vested with wide discretion in determining if prejudice exists as the result of improper actions used in discovery.”²⁰⁶ BP’s three years of delay and obstruction have significantly added to the cost of pursuing Plaintiffs claims and caused years of delay in this litigation. In an effort to obtain basic discovery, including e-mails, Plaintiffs have filed a *Motion to Compel Discovery*, a *Motion to Compel and for Discovery Sanctions*, and a second *Memorandum of Law*. Plaintiffs had to file these motions before BP would even produce a single e-mail.²⁰⁷ Plaintiffs’ motions were granted, but Plaintiffs were forced to file another *Motion for Sanctions* when BP only

²⁰⁵ See *supra* nn.58-68 & accompanying text.

²⁰⁶ *Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 235 (Mo. Ct. App. 1981); see *supra* n.160.

²⁰⁷ See, e.g., *Plaintiffs’ Motion to Compel Discovery* (May 23, 2002), Ex. 6, A151; *Plaintiffs’ Motion to Compel & for Discovery Sanctions* (Feb. 19, 2004), Ex. 13, A249; *Plaintiffs’ Memorandum in Support of Motion to Compel & for Discovery Sanctions*, Ex. 14, A254; *Plaintiffs’ Memorandum of Law Regarding Alleged Ex Parte Contact* (Feb. 27, 2004), Ex. 15, A293.

produced a fraction of the e-mails it stipulated it would produce.²⁰⁸ This discussion does not even include the numerous court hearings that Plaintiffs had to attend and prepare arguments for. Since then, Plaintiffs have had to file numerous other discovery motions and briefs to get BP to comply with its basic obligations to produce responsive documents.²⁰⁹ Despite all of these efforts, BP is still withholding large categories of highly relevant documents.²¹⁰

As Plaintiffs made clear in their *Reply Memorandum in Further Support of Their Motion for Sanctions*, BP is still withholding key information including (1) its transfer price to company owned stations—the alleged discriminatory price that it gave competitors of the plaintiffs; (2) additive and transportation costs needed to show that there is no rational reason for BP’s price distinction; (3) credit card information that could be used to show how far BP consumers traveled to purchase motor fuel and thus

²⁰⁸ *Plaintiffs’ Motion for Sanctions* (Sept. 7, 2004), Ex. 23, A564.

²⁰⁹ *See, e.g., Plaintiffs’ Memorandum in Further Support of Their Motion for Sanctions* (Nov. 10, 2004), Ex. 29, A1004; *Plaintiffs’ Response to BP’s Motion to Reconsider* (Nov. 16, 2004), Ex. 30, A1113.

²¹⁰ *Plaintiffs’ Reply Memorandum in Further Support of Their Motion for Sanctions* (Dec. 10, 2004), at *Respondent’s* A41-48.

the scope of the geographic market for motor fuel; and (4) a host of other documents including BP's strategy documents for eliminating the dealers.²¹¹

In short, the Plaintiffs (1) have been unable to receive the discovery they need to proceed forward with the case; (2) they have been forced to incur the significant expense and time of discovery disputes manufactured by BP in its efforts to drive up the Plaintiffs' costs; and (3) the trial for the wrongs inflicted upon them by BP has been significantly delayed. In a case cited by BP, this Court criticized a defendant who was withholding documents and fighting every discovery motion:

The discovery process was not designed to be a scorched earth battlefield upon which the rights of litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants. The discovery process was not designed to be an endless and unduly expensive ordeal. The rules of discovery are intended to allow pretrial discovery to be conducted as promptly and inexpensively as possible.²¹²

The U.S. Supreme Court has similarly explained that “[m]odern instruments of discovery ... make a trial less a game of blind man's buff and more a fair contest with the basic

²¹¹ *Plaintiffs' Reply Memorandum in Further Support of Their Motion for Sanctions* (Dec. 10, 2004), at *Respondent's* A41-48.

²¹² *State ex. rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 369 (Mo. 2005).

issues and facts disclosed to the fullest practicable extent.²¹³ BP has made every effort to thwart discovery and crush the Plaintiffs with expenses.

Missouri Courts routinely find that delays or costs prejudice the requesting party.²¹⁴ In many cases, the Court does not even mention prejudice since the facts of the case—including repeated costs and delay stemming from discovery battles—are per se prejudice.²¹⁵ In other cases, the court found that the mere effort in reviewing disorganized documents constitutes prejudice.²¹⁶ Here, there is no doubt that the Plaintiffs have suffered prejudice through the delays, costs, and obstruction BP has

²¹³ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

²¹⁴ *See, e.g., McManemin v. McMillin*, 157 S.W.3d 304, 308 (Mo. Ct. App. 2005) (finding that where “the trial was to start twenty-six days after the pretrial conference and, yet, Respondent had not received any of his own purported statements,” the trial court was right to find prejudice even though “[r]espondent cannot show the extent of prejudice to him” specifically); *Heifner v. Synergy Gas Corp.*, 883 S.W.2d 29, 35 (Mo. Ct. App. 1994) (finding prejudice and upholding sanctions where “[b]ecause of the lateness of the disclosure, Plaintiffs had no realistic opportunity to investigate the effect of the differences between the experiment and the conditions that existed at the time of the explosion”).

²¹⁵ *See, e.g., infra* nn.226-233 & accompanying text.

²¹⁶ *Norber v. Marcotte*, 134 S.W.3d 651, 659-60 (Mo. Ct. App. 2004).

intentionally caused. The trial court therefore did not abuse its “wide discretion in determining if prejudice exists.”²¹⁷

5. Judge Riley’s Sanction Against BP—Requiring Production of an Additional 200,260 E-mails—Was Appropriate

a. Overview

Missouri Supreme Court Rule 61.01 provides for a number of specific sanctions when a party fails to produce documents:

(d) Failure to Produce Documents If a party ... fails to produce documents and tangible things as requested under Rule 58.01, or timely files objections thereto that are thereafter overruled and the documents and things are not timely produced ..., the court may, upon motion and reasonable notice to other parties, *make such orders in regard to the failure as are just* and among others the following:

(1) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibit the disobedient party from introducing designated matters in evidence.

(2) An order striking pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding

²¹⁷ *Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 235 (Mo. Ct. App. 1981); *see supra* n.160.

or any part thereof or, rendering a judgment by default against the disobedient party.

(3) An order treating as a contempt of court the failure to obey.

(4) An order requiring the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.²¹⁸

As discussed in the rule and explained by Missouri courts, sanctions may include exclusion of evidence, striking of pleadings, reinstituting of punitive damages, and default judgment.²¹⁹ But the trial court is not limited to these sanctions and "has broad discretion to ... *cho[ose] remedies in response to ... discovery [violations]*."²²⁰ Courts

²¹⁸ *Mo. Sup. Ct. R.* 61.01 (emphasis added).

²¹⁹ *Id.*; *Klein v. Gen. Elec. Co.*, 728 S.W.2d 670, 671 (Mo. Ct. App. 1987) ("Plaintiffs should have requested either reinstatement of their punitive damages claim or other appropriate relief when the alleged fraud was discovered.").

²²⁰ *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. 1997) (emphasis added). The case law from other jurisdictions, discussing the nearly identical federal rule, supports this broad discretion. *See, e.g., Zornes v. Specialty Industries, Inc.*, 1998 WL 886997, at *9 (4th Cir. 1998) ("Rule 37 is flexible.... The sanctions enumerated in the rule are not exclusive and arbitrary but flexible, selective, and plural. The district court

have imposed other unique and unenumerated sanctions where the circumstances called for them.²²¹

The purpose of Missouri Rule 61.01—like Rule 37, its federal equivalent—is to allow the trial “courts to punish deliberate noncompliance with the ... rules of discovery and to deter such conduct in the future.”²²² For instance, in one of the cases BP cited, the Eleventh Circuit noted that “non-compliance with discovery rules” may allow a court to

may, within reason, use as many and as varied sanctions as are necessary to hold the scales of justice even.”).

²²¹ *Sutherland v. Mesa Air Group, Inc.*, 2003 WL 21402549, at *5 (S.D. Fla. 2003) (imposing sanctions of "\$1,000 per day for each day that Defendant fails to respond to the outstanding discovery requests" and reporting counsel's "misconduct ... to the Georgia Bar"); *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 867 (Miss. 2004) (imposing purely punitive fines for discovery violations); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.P.R. 1994) (upholding a sanction requiring counsel for both parties after a case had settled to pay a monetary sanction to the court for their discovery misconduct).

²²² *Zornes v. Specialty Industries, Inc.*, 1998 WL 886997, at *9 (4th Cir. 1998). *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980) (“Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

impose sanctions, including “direct access” by the requesting party to the electronic databases of the producing party.²²³ In other words, where a party violates discovery rules, a court may order production of materials that includes irrelevant (and even privileged) materials as a sanction.²²⁴ In *Ford Motor Co.*, the Court found that this was improper only because “the district court made no findings—express or implied—that Ford had failed to comply properly with discovery requests.”²²⁵

It is clear that the sanction imposed by the trial court—production of the full 501,361 e-mails—was well within its discretion. Under the circumstances presented here, the trial court could have imposed far more serious sanctions—up to and including default judgment—for BP’s wrongful conduct. The court chose to be lenient here.

b. Under the Facts of This Case, the Trial Court Could Have Imposed the Extreme Punishment of Default Judgment

There is no Missouri case law discussing potentially overbroad production as a sanction. But such a sanction—here production of 200,260 potentially relevant e-mails—is clearly a far less severe sanction than default judgment, striking of pleadings, or even an adverse instruction that the documents not produced are harmful to BP. BP’s wrongful conduct here was enough to justify default judgment or striking its pleadings, and therefore is certainly more than enough to justify the far more lenient sanction that

²²³ *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003).

²²⁴ *Id.*

²²⁵ *Id.*

the trial court actually imposed. Accordingly, Plaintiffs will discuss the case law for imposing default judgment or striking pleadings.

“An order striking a party’s pleadings is justified where the record shows a pattern of repeated disregard of the obligation to comply with discovery.”²²⁶ In *In re Marriage of Lindeman*, one party had failed over a period of two years to fully answer interrogatories and produce all responsive documents.²²⁷ Like BP, the producing party claimed that “he complied with the vast majority of [the requesting party’s] discovery requests.”²²⁸ But the court found that the party’s failure to follow four court orders—the same number at issue here—justified the severe sanctions the trial court imposed.²²⁹ The court found that the trial court did not “abuse[] its discretion in striking [the party’s] pleadings and not allowing [the party] to testify or produce evidence at trial.”²³⁰

In *Scott v. LeClercq*, the court found that where a party initially filed objections, produced no documents, and later “provided incomplete responses to some of the interrogatories and production requests” “only after [the requesting party] filed a motion

²²⁶ *Scott v. LeClercq*, 136 S.W.3d 183, 190 (Mo. Ct. App. 2004).

²²⁷ *In re Marriage of Lindeman*, 140 S.W.3d 266, 271 (Mo. Ct. App. 2004).

²²⁸ *Id.* at 270.

²²⁹ *Id.* at 271. In reality, one of the orders in *Lindeman* was negotiated by the parties making it more like a stipulation, whereas here there were four separate orders and a stipulation that BP violated.

²³⁰ *Id.*

to compel,” it was reasonable for the trial court to conclude that the producing party “was intentionally delaying the litigation by failing to respond to discovery.”²³¹ When the party continued to withhold discoverable information and gave vague answers in deposition, the “trial court did not abuse its discretion by striking [the producing party’s] answer.”²³² In, *LeClercq*, the Court imposed this sanction on the basis of three violated orders—as opposed to the four orders in this case—before the Court issued sanctions.²³³

In *Norber v. Marcotte*, the court found that a party’s form objection to interrogatories and requests for production, its missing of a deadline compelling it to produce responsive documents, and its later disorganized production was enough to justify striking the party’s pleadings and granting default judgment.²³⁴ In *Restorative Services, Inc. v. Professional Care Centers, Inc.*, the court found that where there was a history of the defendant’s “continuous frustration of [the plaintiff’s] efforts to obtain discovery over a period in excess of twelve months,” the sanction of striking pleadings was appropriate.²³⁵ Like here, the defendant made repeated assurances that full

²³¹ *Scott v. LeClercq*, 136 S.W.3d 183, 190 (Mo. Ct. App. 2004).

²³² *Id.* at 191-92.

²³³ *Compare id.* at 190-92 with *supra* n.21.

²³⁴ *Norber v. Marcotte*, 134 S.W.3d 651, 660-61 (Mo. Ct. App. 2004).

²³⁵ *Restorative Servs., Inc. v. Prof’l Care Ctrs., Inc.*, 793 S.W.2d 141, 144 (Mo. Ct. App. 1990).

production and answers would be forthcoming, and like here, Defendant never fulfilled these promises.²³⁶

Other cases found default judgment based on similar misconduct—in many cases far less than what BP is guilty of here.²³⁷ Harsh sanctions are appropriate where a party repeatedly violates court orders.²³⁸

²³⁶ *Id.*

²³⁷ *See, e.g., Dobbs v. Dobbs Tire & Auto Ctrs., Inc.*, 969 S.W.2d 894, 898-99 (Mo. Ct. App. 1998) (finding that dismissal of a “counterclaim with prejudice” was an appropriate sanction for failure to attend a deposition).

²³⁸ *McManemin v. McMillin*, 157 S.W.3d 304, 308 (Mo. Ct. App. 2005) (finding striking of pleadings to be appropriate where there was (1) “failure to respond to discovery requests,” (2) “time delay in requesting the dismissal be set aside,” (3) “failure of Appellant’s counsel to appear for a pretrial conference,” and (4) “failure to produce a properly requested recording,” because these actions “provide[] a basis for the trial court to find Appellant’s actions to be contumacious and with deliberate disregard for the trial court’s authority”); *Luster v. Gastineau, Jr.*, 916 S.W.2d 842, 844-45 (Mo. Ct. App. 1996) (upholding dismissal of Plaintiffs’ claims where plaintiffs answered seven interrogatories evasively, failed to deliver authorizations for medical records and tax returns, and failed to follow the court’s order); *Baughn v. Rapidways Truck Leasing Co. v. Gen. Motors Corp*, 698 S.W.2d 618, 620 (Mo. Ct. App. 1985) (repeated failures to fully answer interrogatories and produce documents justified dismissal of plaintiff’s

**c. The Trial Court Did Not Abuse Its Discretion in Ordering
BP to Produce All 501,361 E-mails as a Sanction**

When Judge Riley was considering *Plaintiffs' Motion for Sanctions*, there was the following factual background:

- BP had resisted court orders and engaged in lengthy delays in even gathering or producing e-mails at all.²³⁹
- When BP finally produced any e-mails, it engaged in its own unilateral searches without permission of the Court or the Plaintiffs.²⁴⁰ These searches were not adequate under the law.²⁴¹
- The number of e-mails BP claimed were responsive to its search terms and that it would produce kept changing: 310,994, 115,885, 306,947, and 301,101.²⁴² The only number that never changed was the total number of e-

claims); *Great W. Trading Co. v. Mercantile Trust Co. Nat'l Ass'n*, 661 S.W.2d 40, 43 (Mo. Ct. App. 1983); *Amick v. Horton*, 689 S.W.2d 369, 376-77 (Mo. Ct. App. 1985) (affirming dismissal where there had been four warnings and two orders regarding plaintiff's failure to answer interrogatories).

²³⁹ See *supra* §§ IV.B.3.a; III.B.1-2.

²⁴⁰ See *supra* § IV.B.3.b.iv

²⁴¹ See *supra* §§ IV.B.3.b.ii-iii.

²⁴² See *supra* § III.B.2.b.

mails that BP pulled: 501,361—the exact number the trial court ordered BP to produce.

- BP hid the fact that it had been pulling e-mails that were responsive to search terms from the e-mails it produced based solely on their subject line without telling Plaintiffs or the trial court.²⁴³
- BP had engaged in numerous other discovery violations—including violations of several court orders.

In short, after years of discovery, there were 200,260 e-mails that BP had never adequately searched for relevance or produced. The trial court could have ordered a better electronic search of these e-mails so that responsive documents would be pulled, and it could have imposed some other sanction on BP for its wrongful conduct, such as striking BP's pleadings. But doing a new search would require BP's cooperation and would undoubtedly result in more delays, obstruction, and possibly deception by BP. Rather than engaging in this process again, the Court ordered a mild sanction that not only punished BP but also furthered the discovery process. It ordered the production of the full 200,260 e-mails but still allowed BP to search for and remove any privilege e-mails.

BP has argued that the 200,260 e-mails it had not produced were not responsive or relevant. But there is no way of knowing this because BP never conducted an adequate

²⁴³ See *supra* §§ IV.B.3.b.iv; III.B.2.

search for responsive e-mails.²⁴⁴ The e-mails come from mailboxes of employees that BP identified as “key players,” and since no adequate search was ever conducted, all of the e-mails pulled are potentially relevant. BP complains about the fact that it is being forced to produce irrelevant e-mails, but BP has only itself to blame because it is BP’s delays and failure to conduct an adequate search that resulted in the court issuing the sanction.

In addition, given the stringent protective order in this case—preventing anyone but Plaintiffs’ counsel to review documents marked highly confidential—a designation BP used on its e-mail production so far—there is little harm in BP producing e-mails that may be irrelevant.²⁴⁵ Indeed, BP’s vigor in opposing this order suggests that its real fear is not production of irrelevant e-mails but production of relevant ones.

Judge Riley’s sanctions are quite lenient considering the circumstances. As discussed above, Judge Riley could have issued a default judgment against BP for its repeated failure to follow court orders. But Judge Riley chose not to. BP’s problematic conduct here was its own failure to adequately review and produce e-mails. It had failed to do so for several years, and even when it did do a search, it grossly violated its obligations under the law. And BP kept changing the number of e-mails it claimed were responsive and that it would produce. Under these circumstances, Judge Riley undoubtedly thought that the only way to ensure that responsive e-mails would be produced at all (much less on a timely basis) was to order the production of the remaining

²⁴⁴ See *supra* § IV.B.3.b.

²⁴⁵ *Protective Order* (Oct. 1, 2002), Ex. 49.A, A1538.

e-mails. This sanction—far short of the default judgment Plaintiffs had asked for—was wholly reasonable.

d. Contrary to BP’s Third and Fifth Points, the Trial Court Did Not Abuse Its Discretion in Finding that Its Sanction Was Not Overly Burdensome and That Cost-Shifting Was Not Appropriate

i. Overview

BP argues that production of the 200,260 e-mails should be denied because the trial court abused its discretion in not finding that the burden of producing the e-mails outweighs their usefulness. But this framework is wholly inappropriate here. The burden that BP points to is the alleged \$62,000 fee EED will charge it to help review the e-mails for privilege. This “burden” is solely the result of BP’s wrongful discovery conduct. If BP had consulted the Plaintiffs or the Court *before* conducting its electronic search of e-mails, it would have only needed EED to search the e-mails one time, and it would have avoided having to pay EED to search the e-mails again. Instead, BP conducted a sloppy, unilateral search not approved by any court, resulting in undoubtedly numerous relevant e-mails that were not produced. Because BP’s wrongful discovery conduct resulted in an additional search needing to be done, it must pay for that search. Second, even if BP’s wrongful conduct were not taken into account, the large number of potentially relevant e-mails is worth the alleged \$62,000 BP claims that it will cost to produce them.

BP's cost-shifting argument fails for many of the same reasons. First, the Plaintiffs should not have to pay a cost caused by BP's wrongful conduct. Second, courts do not allow cost-shifting for electronic documents in an accessible format (such as e-mails pulled from a hard drive), which BP admits is the format of the e-mails here. Third, no court has allowed cost-shifting for a privilege review, which is the only cost BP has identified here. Fourth, the \$62,000 BP identifies is an excessive number since Plaintiffs have been able to load 300,000 e-mails onto a database and do repeated searches of them for a fraction of that figure. Finally, cost-shifting is not appropriate here because any cost is a reasonable monetary sanction for BP's wrongful discovery conduct relating to e-mails.

**ii. Contrary to BP's Third Point, a Privilege Review of
the 200,260 E-mails Is Not Unduly Burdensome**

In BP's Point III, it argues that "the trial court abused its discretion [by] requir[ing] production of e-mails that are overly burdensome and expensive for BP to produce in relation to the e-mails' probative value to Plaintiffs."²⁴⁶ BP explains that "a court may order that certain discovery should not be allowed in any situation in which the production of the discovery would place a large burden or expense on the producing party in relation to the benefit received by the other party."²⁴⁷ But the cases BP cites all start from the presumption that the expense is one a party *has to incur*—one caused by the

²⁴⁶ *Relator's Brief*, at 94.

²⁴⁷ *Id.* at 95.

discovery production itself and not by the past wrongful actions of a particular party. It goes without saying that if a party wrongfully drives up its own costs, this is not the sort of burdensomeness that the courts try to prevent.

The cost BP refers to is an expense BP could have avoided entirely by conducting its e-mail search correctly the first time. BP complains about the \$62,000 it will take to load the 200,260 e-mails back onto EED and electronically review them for privilege.²⁴⁸ BP also complains about the cost that it would take to review these e-mails by hand,²⁴⁹ but the trial court specifically ordered BP to produce the e-mails without review other than privilege, and BP has represented that it could load the documents into EED and perform an electronic privilege review (and a hand review of any that the review flagged) in fifteen days for \$62,000 plus minimal review time; last time BP was required only to review approximately 1000 e-mails by hand.²⁵⁰

²⁴⁸ *Relator's Brief*, at 40 (“BP investigated the cost to put these 200,000 e-mails into EED’s review program so BP could perform a privilege review before producing them. EED informed BP that it would cost approximately \$62,000 for review and production.”).

²⁴⁹ *Id.* at 40, 99.

²⁵⁰ Plaintiffs are not aware of anywhere in the record where BP identifies how many e-mails it reviewed for privilege, but it conducted this review in a short amount of time and only withheld 882 on the basis of privilege, so it is likely that around 1000 actually hit on privileged terms. *Id.* at 38.

But BP's alleged \$62,000 cost of reviewing these e-mails for privilege could have entirely been avoided if BP had adequately conducted its search the first time. BP already had EED search the full 501,361 e-mails.²⁵¹ If BP's search had been adequate, the trial court would not have ordered production of the full 501,361 e-mails. The problem was that BP's search was grossly inadequate and left a high probability that numerous highly irrelevant e-mails were missed.²⁵² To summarize points made in detail earlier, BP conducted a sloppy search,²⁵³ with its own unilateral list of search terms (a protocol no court has suggested or sanctioned),²⁵⁴ and it then removed e-mails based solely on their subject line without informing the trial court or the Plaintiffs and without ever providing a list of subject lines removed.²⁵⁵

As a result of BP's grossly inadequate search, it is highly likely that large numbers of relevant and responsive e-mails were missed due to BP's wrongful discovery conduct. BP had no excuse for its improper search. The trial court had already issued two orders compelling it to produce responsive documents, and if BP had any questions about how to conduct its search, it should have asked the court before spending large sums of money to conduct a search out of tune with any case law on electronic discovery. ***Because BP***

²⁵¹ *Relator's Brief*, at 31.

²⁵² *See supra* § IV.B.3.b.

²⁵³ *See supra* § IV.B.3.b.iv(b).

²⁵⁴ *See supra* §§ IV.B.3.b.ii; IV.B.3.b.iv.

²⁵⁵ *See supra* §§ IV.B.3.b.iiiIV.B.3.b.iv(c).

conducted the search before contacting the trial court or the Plaintiffs, the only two ways to insure that relevant e-mails were reasonably searched for was to incur the costs of searching them again (either manually or electronically) or to order that BP produce all 501,361 non-privileged e-mails. According to BP, both of these solutions would require it to spend \$62,000 just to use EED to help review the e-mails for privilege. So from a cost perspective the two alternatives are equal, and Plaintiffs have already discussed in detail the trial court's reason for choosing the latter.²⁵⁶

In short, BP's wrongful conduct put the trial court in the position of choosing to either allow BP's grossly inadequate search to stand or entering an order that would require allegedly \$62,000 more for BP to conduct a privilege review. If plaintiffs can review 300,000 on a database for a fraction of \$62,000, surely BP can do so also. Since BP caused the problem, the court thought it was reasonable for BP to pay the cost. This solution makes eminent sense. Why should the Plaintiffs miss relevant e-mails because of improper discovery conduct by the defendant? And it is perfectly reasonable for BP to bear the expense of its own mistakes (whether intentional or negligent). Any other rule would create incentives for parties to engage in similar discovery misconduct and then argue that doing a new search is cost-prohibitive.

Assuming arguendo that BP's framework of burdensomeness is applied, BP still must produce the e-mails. The 501,361 e-mails are e-mails from employees that BP identified as "key players." The search terms that BP used missed numerous highly

²⁵⁶ See *supra* § IV.B.5.a-c.

relevant items. Just to name a few things, BP's search missed identifying numbers of numerous plaintiffs and terms that would capture key pricing information as well as e-mails about BP's discriminatory conduct.²⁵⁷ And since BP is unwilling to review its documents by hand, there is no other way to obtain these relevant and responsive documents other than spending money to load them onto EED or another electronic database.

BP complains about the alleged \$62,000, but apart from this expenditure being BP's fault, it is a relatively small sum of money in a large commercial case. Plaintiffs themselves were forced to spend far more than that in attorney time on fighting BP on silly discovery issues.²⁵⁸ BP has probably spent far more on attorney's fees just on this appeal (and its briefs below on this issue). In addition, the \$62,000 is not an accurate figure since Plaintiffs were able to do repeated searches on their own software of 300,000 e-mails for a fraction of this price. Accordingly, the trial court was well within its discretion in repeatedly ordering that BP pay for its own privilege review.

²⁵⁷ See *supra* § IV.B.3.b.iv(b).

²⁵⁸ See *supra* nn.207-210 & accompanying text.

**iii. Contrary to BP's Fifth Point, the Trial Court Did
Not Abuse Its Discretion in Denying Cost-Shifting**

**(a) Cost Shifting Is Inappropriate Because the
Cost Was Caused by BP's Wrongful
Conduct**

BP is not entitled to cost-shifting because the \$62,000 expense it seeks to shift is a direct result of its own discovery violations as discussed in detail in the preceding subsection. No court has found that a party may shift the costs that it wrongfully increased through its own discovery violations.

**(b) Cost-Shifting Is Inappropriate Because
Courts Do Not Allow Cost-Shifting for
Accessible Data**

Missouri discovery rules require the costs to be borne by the producing party; they also require that attorney's fees (including those of reviewing privileged documents) be borne by each party and not shifted to the other side.²⁵⁹ For electronic evidence, no court has recognized cost-sharing unless the electronic documents are in an "inaccessible" format. Even in the *Zubulake* line of cases that BP relies so heavily upon in its *Suggestions* to both this court and the court of appeals, the court found that e-mails gathered from a hard-drive or network are accessible and cost shifting is not appropriate:

²⁵⁹ See, e.g., *Long v. Long*, 135 S.W.3d 538, 544 (Mo. Ct. App. 2004) ("[E]ach party should bear his or her own litigation expenses.").

[C]ost-shifting should be considered *only* when electronic discovery imposes an "undue burden or expense" on the responding party....

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense....

In fact, whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format [I]n the world of electronic data, thanks to search engines, any data that is retained in a machine readable format is typically accessible....

Of these, the first three categories [(1) Active, online data, (2) Near-line data, (3) Offline storage/archives] are typically identified as accessible

Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. "Inaccessible" data, on the other hand, is not readily usable. Backup tapes must be restored ..., fragmented data must be defragmented, and erased data must be reconstructed, all before the data is usable....²⁶⁰

²⁶⁰ *Zubulake v. UBS Warburg LLC* ("Zubulake I"), 217 F.R.D. 309, 318-20 (S.D.N.Y. 2003).

Zubulake I goes on to find that "active user e-mail files" and "archived e-mails on optical disks" are accessible data and "therefore, the producing party should bear the cost of production."²⁶¹

Every other case that even considers cost-shifting allows cost-shifting only where the material is in an inaccessible format.²⁶² For example, *OpenTV v. Liberate Technologies*, relied upon by BP in its *Suggestions* filed with the Court of Appeals,²⁶³ specifically follows *Zubulake I*, and decides that in its case the "requested electronic data is stored in an inaccessible format for purposes of discovery."²⁶⁴ In *OpenTV*, the issue was whether cost shifting was appropriate "to produce approximately 100 additional versions of source code for various Liberate products."²⁶⁵ The court noted that "Liberate's source code must be extracted from Liberate's storage system to be

²⁶¹ *Id.* at 320.

²⁶² See, e.g., *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439, at *5-7 (E.D. La. 2002) (applying cost shifting only where back-up tapes were involved); *In re Gen. Instrument Corp. Securities Litigation*, 1999 WL 1072507 (N.D. Ill. 1999) (back-up tapes); *In re Hagemeyer North America, Inc.*, 222 F.R.D. 594, 599-600 (E.D. Wis. 2004) (back-up tapes); *Wiginton v. CB Richard Ellis, Inc.*, 2004 WL 1895122, at *5 (N.D. Ill. 2004) (back-up tapes).

²⁶³ See A1505.

²⁶⁴ *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 477 (N.D. Cal. 2003).

²⁶⁵ *Id.* at 475.

reviewed."²⁶⁶ Because the court found that the storage system was the equivalent of back-up tapes ("similarly expensive and time consuming"), it was inaccessible and cost-shifting analysis could be considered.²⁶⁷

BP's documents were gathered from active e-mail files, the first and most accessible kind of information. As *Zubulake I* noted, this does not mean that it will not take some time to access the information or that the information may not be in the perfect format. But nonetheless, Judge Riley was entitled to conclude that the information is accessible and thus the costs are borne by BP.

In addition, courts have generally held, as Judge Riley did here, that searches designed to conduct a privilege review are costs that the producing party should rightfully bear.²⁶⁸ In this case, BP wants Plaintiffs to foot the bill of its substantial costs to increase its attorneys' searching ease to review privileged materials without ever giving the Plaintiffs the benefit of the database it plans to create. Judge Riley did not abuse his discretion in rejecting BP's unwarranted attempt to shift costs.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 477.

²⁶⁸ *Rowe Entertainment v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 432 (S.D.N.Y. 2002); 2/25/05 *Order*, at 3, A1221 ("[A]ny costs associated with a privilege review of these documents are properly borne by Defendant."); *see generally Long v. Long*, 135 S.W.3d 538, 544 (Mo. Ct. App. 2004) ("[E]ach party should bear his or her own litigation expenses.").

C. BP's Second and Fourth Points about Privileged Materials and Confidentiality Are Misplaced

Plaintiffs address these two points separately from their sanctions arguments because the most direct response is that the trial court did not order the production of privileged materials nor violate any confidentiality or privacy interest.

1. Contrary to BP's Second Point, the Trial Court Has Consistently Allowed BP the Opportunity to Review Its E-mails for Privilege—an Opportunity BP Still Has If the Trial Court's Orders Are Affirmed

The trial court never ordered BP to produce privileged materials. BP had *two years* after being compelled to produce responsive documents to review its e-mails for privilege, but it did not do so.²⁶⁹ After the Court ordered BP to produce the responsive e-mails, BP has had another *entire year* to conduct such a review, but it has not done so.²⁷⁰ In addition, in BP's *Motion for Reconsideration* of the trial court's Oct. 12, 2004 order requiring production of the 200,260 e-mails at issue here, BP *asked for an additional two weeks* to review its documents for privilege.²⁷¹ More than *three months* later, on

²⁶⁹ There are two years between the trial court's *10/7/02 Order*, Ex. 9, A203, compelling production and the trial court's order that BP produce the e-mails at issue here. *10/12/04 Order*, A704.

²⁷⁰ It is now October 24, 2005, one full year after the *10/12/04 Order*, A704.

²⁷¹ *BP's Motion for Reconsideration*, at 26 (Nov. 2, 2004), Ex. 28, A732.

February 25, 2005, Judge Riley rejected BP's motion for reconsideration but ***gave BP the additional fifteen days it requested*** to produce the e-mails, so that BP could conduct a privilege review and produce a privilege log.²⁷² Even now, under the trial court's order, if this Court rejects BP's Writ Petition, BP will still have an additional fifteen days to review the documents for privilege.²⁷³ BP has had more than enough time to review its documents for privilege. Even so, the trial court still generously gave BP the fifteen days it requested to review its e-mails for privilege.

Perhaps the best evidence of this is that ***BP never raised the issue of privilege with the trial court, nor did it ever ask the trial court for more than two weeks to review the e-mails for privilege.***²⁷⁴ BP did not complain about producing privileged documents because in both of the trial court's orders, the court specifically provided BP more than the time it requested to conduct a privilege review.²⁷⁵ This section does not discuss most

²⁷² 2/25/05 Order, at 3, A1221.

²⁷³ 4/8/05 Order, Ex. 57, A1623.

²⁷⁴ See Defendant's Memorandum in Opposition to Plaintiffs' Motion for Sanctions, Ex. 25, A635; Defendant's Motion for Reconsideration of Court's Order of October 12, 2004 and/or Defendant's Motion for Security for Costs and/or Motion for an Extension of Time, at 26, Ex. 28, A732.

²⁷⁵ Compare Defendant's Motion for Reconsideration of Court's Order of October 12, 2004 and/or Defendant's Motion for Security for Costs and/or Motion for an Extension of Time, at 26, Ex. 28, A732 (requesting "a minimum of two weeks ... to

of the case law BP cites because the trial court allowed BP to review its documents for attorney-client privilege, so there is no need to discuss whether it would have been an abuse of discretion for the trial court to not allow a review for privilege.

BP complains that it “repeatedly informed the trial court, in briefs and affidavits and at numerous hearings, that to perform any type of privilege review of its e-mails, the e-mails must be migrated into the computer software review program of EED, its third-party vendor.”²⁷⁶ It claims that the lower court ordered it to “‘simply copy all of the e-mails in their original format onto CD ROM discs’” and that “[b]y forcing BP to proceed in this manner, the trial court essentially denied BP the chance to conduct a privilege review of the e-mails.”²⁷⁷ BP apparently thinks that the trial court’s order bars it from using EED to review its documents for privilege. But the trial court never said this, and Plaintiffs do not object to BP using EED to review the e-mails for privilege.²⁷⁸ The trial

review the e-mails and prepare the CDs for production”) *with 10/12/04 Order*, Ex. 27, at 3 (providing BP twenty-one days to produce the e-mails); *2/25/05 Order*, Ex. 39, A1221 (providing BP “fifteen (15) days from the date of this Order” to produce the e-mails).

²⁷⁶ *Relator’s Brief*, at 92.

²⁷⁷ *Id.* at 92-93.

²⁷⁸ Plaintiffs do not object to the privilege review methodology that BP ultimately used on the 300,000 e-mails it has already produced. It conducted an electronic search and then manually reviewed all of the e-mails that had been “hit” on the electronic search. *See Relator’s Brief*, at 37-38. The e-mails that were tagged as privileged by the

court's order clearly allows BP to review the e-mails for privilege and does not specify how BP is supposed to produce the e-mails:

Wherefore, it is hereby ordered that Defendant's motion to reconsider is **denied**, and its related motion for security for costs is also **denied**. The motion for extension of time is **granted, in part**. It is ordered that Defendant shall produce all 501,361 e-mails and attachments, as identified in this Court's order of October 12, 2004, or a privilege log for any specific e-mails or attachments not provided, by no later than fifteen days from the date of this Order. As was also indicated in the Court's Order of October 12, 2004, so as to limit the potential for confusion, Defendant is ordered to convey to Plaintiff the counting methodology used in calculating the number of e-mails and attachments initially located (501,361), and the number being provided.²⁷⁹

Nothing in this order requires BP to "produce the 200,000 e-mails by 'simply copy[ing] all of the e-mails in their original format onto CD ROM discs.'",²⁸⁰

BP's claim that the trial court would not allow it to use EED is based on another part of the Court's order. Ignoring the "Wherefore" part of the trial court's order, BP

electronic search and then further identified by hand as being privileged were listed on a privilege log and not produced.

²⁷⁹ 2/25/05 Order, Ex. 39, A1221.

²⁸⁰ *Relator's Brief*, at 92.

points to a statement that the trial court made in explaining why cost-shifting is inappropriate here. In its section on BP's request to shift costs to the Plaintiffs, the court explained that "any costs associated with a privilege review of the[] documents are properly borne by Defendant."²⁸¹ It also explained that the only costs BP had identified were "privilege review costs" because absent a privilege review, BP *could* "simply copy all of the e-mails in their original format onto CD ROM discs," which is costless.²⁸² Because privilege costs are the only identified costs and since these are properly born by BP, "Defendant's alternative motion for security for costs and/or for cost-sharing with regard to its costs related to producing the e-mails is also denied."²⁸³ Accordingly, the trial court's order was not specifying how BP could review the documents for privilege but instead was explaining why BP's costs—wholly a result of its own privilege review—should not be borne by the Plaintiffs.

BP also complains that "[t]he trial court attempted to 'protect' BP by stating that BP could assert the privilege at trial if privileged documents were produced pursuant to the Orders" and that "[t]he 'protection' given by the trial court ... is illusory."²⁸⁴ But like the cases BP cites, the trial court's proposal was simply an option if BP did not want to

²⁸¹ 2/25/05 Order, Ex. 39, A1221.

²⁸² *Id.* 2, Ex. 39, A1220.

²⁸³ *Id.*

²⁸⁴ *Relator's Brief*, at 86.

pay the costs of reviewing the e-mails for privilege.²⁸⁵ BP was still free to either conduct the privilege review—paying its own costs—or simply produce the e-mails without any waiver of privilege. The cost-sharing issue was discussed *supra* § IV.B.5.d.iii, but regardless of who paid the cost, BP clearly had the option of using EED to review the e-mails.

What makes BP’s discussion of privilege even more confusing is that it does not specify what relief it is requesting. If Plaintiffs understand BP’s complaint correctly, it is seeking only that it be allowed to use EED to review the documents for privilege in the fifteen day period provided by the trial court. But instead of specifying this relief—which Plaintiffs would happily consent to—BP asks for “an adequate amount of time in which to conduct a privilege review of those documents.”²⁸⁶ But BP has never presented any evidence of why it needs additional time or how much additional time it would need. As stated before, *BP only asked the trial court for “a minimum of two weeks ... to*

²⁸⁵ *Roe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 432 (S.D.N.Y. 2002) (providing the producing party the option of producing all e-mails with no “waiver of the privilege” or paying “[t]he expense of sorting such documents” and pulling out the privileged ones); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439, at * 7 (E.D. La. 2002) (providing the producing party the same option of agreeing to no waiver of privilege or “bear[ing] the cost of ... identifying those portions [of the e-mail] that it maintains are privileged”).

²⁸⁶ *Relator’s Brief*, at 91, 122.

review the e-mails and prepare the CDs for production,” which the trial court gave it.²⁸⁷

Given this wholesale failure to produce any evidence—which BP admits it has the burden of proof on—BP’s vague requested relief should be denied.²⁸⁸ Because BP specifically requested only 2 weeks from the trial court—providing no other information—it cannot fault the trial court for providing what it asked for. Even after BP’s appeal, the trial court has continued to specify that BP would have fifteen days following an order to review the e-mails for privilege.²⁸⁹

BP states in a caption heading that “the minimum 14 days requested by BP was alternative relief requested to perform merely a cursory ‘privilege’ search term review.”²⁹⁰ BP never elaborates on this point. ***BP never said this to the trial court when***

²⁸⁷ *Defendant’s Motion for Reconsideration of Court’s Order of October 12, 2004 and/or Defendant’s Motion for Security for Costs and/or Motion for an Extension of Time*, at 26, Ex. 28, A732.

²⁸⁸ *Relator’s Brief*, at 91 (admitting that “the party asserting the privilege usually has the burden of proof to show that the privilege applies). BP could easily have met this burden of proof by producing a privilege log. *See State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. 2004) (“In order to invoke [a defense of privilege], the party opposing discovery must [present] competent evidence ...[which] may include a privilege log and affidavits from counsel.”).

²⁸⁹ *3/14/05 Order*, Ex. 51, A1551; *4/8/05 Order*, at 1, Ex. 57, at 1623.

²⁹⁰ *Relator’s Brief*, at 91.

*it requested two weeks, and it never asked for additional time or gave any explanation as to how it would perform its privilege review or how much time was needed.*²⁹¹ BP's *Motion* was only in the "alternative" in the sense that it asked not to produce the e-mails at all.²⁹² Clearly, it was reasonable for the trial court to assume that if the e-mails were ordered to be produced, BP could review them for privilege in the fourteen days it had asked for. In any case, BP has now had over an additional year since the trial court's sanction order of October 12, 2004 to review these e-mails for privilege.

The only way BP's privilege argument could possibly be on weaker grounds than it is now is if BP were to ask to review for privilege by hand—a request that it has not made to our knowledge. BP has had three years to conduct a privilege review since it was first compelled to produce responsive documents.²⁹³ BP has repeatedly proven unwilling to take the time to review its e-mails for privilege and responsiveness by hand—demanding instead that its unilateral electronic search is an adequate substitute. Even if BP had told the trial court that it needed a certain amount of time to review the 200,260 e-mails for privilege by hand—BP never asked—the trial court would have been more than reasonable in denying such a request given BP's lengthy delays in conducting any review and its repeated refusals to review the e-mails by hand.

²⁹¹ *Defendant's Motion for Reconsideration*, Ex. 28, A707.

²⁹² *Id.* at 27, Ex. 28, A733.

²⁹³ 10/12/04 *Order*, A704; 7/20/04 *Order*, Ex. 18, A512.

**2. Contrary to BP's Fourth Point, the Trial Court Did Not Exceed
Its Authority by Violating the Privacy Expectations of Any
Third Parties**

In its brief to this Court, BP next attempts to argue that Judge Riley's October 12, 2004 and February 25, 2005 Orders required BP to produce 200,260 e-mails that may have included what BP refers to as "irrelevant, private, personal and confidential e-mails."²⁹⁴ To assert this argument, BP first rehashes its same general argument that the required production might include irrelevant information -- which BP contends violates Supreme Court Rules 56.01(b) and 56.01(c). As discussed throughout the plaintiffs' brief, however, Judge Riley's Orders did not exceed his authority under the Missouri Rules of Civil Procedure, and were well within his authority to control discovery by the parties, including the imposition of sanctions against BP for its improper discovery practices.²⁹⁵

²⁹⁴ *Relator's Brief*, at 105-08.

²⁹⁵ See generally *Goede v. Aerojet General Corp.*, 143 S.W.3d 14, 22 (Mo. Ct. App. 2004) ("The trial court has broad discretion to control discovery This discretion extends to the trial court's choice of remedies in response to the non-disclosure of evidence during discovery."); *Enos v. Ryder Automotive Operations, Inc.*, 73 S.W.3d 784, 791 (Mo. Ct. App. 2002) (citing *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. 1997) ("The trial court has broad discretion to control discovery including choosing a remedy in response to the non-disclosure of evidence or witnesses.")).

In a further effort to try and deflect this Court's attention away from the actual issues before it, BP also argues that it should not be required to produce the 200,260 e-mails because of a professed concern for the privacy of its employees' e-mails.²⁹⁶ However, the trial court's Orders here did not unlawfully violate the privacy expectations of any of the authors or recipients of the 200,260 company e-mails at issue in this matter, and BP's arguments are without merit.

As an initial matter, BP's argument is frivolous because BP did not raise this issue before the trial court and because there is a comprehensive protective order in place.²⁹⁷ This protective order prevents anyone other than counsel (not even the Plaintiffs themselves) from reviewing documents marked highly confidential—a designation used by BP for the 300,219 e-mails it has produced. As a result, BP's concern about privacy or confidentiality bears little merit given the protection already provided by the trial court.

As this Court is well aware, “[t]he general rule of discovery is that the parties may obtain information regarding any matter relevant to the subject matter involved in the

²⁹⁶ *Relator's Brief*, at 105-08.

²⁹⁷ *See, e.g., Defendant's Memorandum in Opposition to Plaintiffs' Motion for Sanctions*, Ex. 26, A635; *Defendant's Motion for Reconsideration*, Ex. 28, at A707; *Protective Order* (Oct. 1, 2002), Ex. 49.A, A1538.

pending action so long as the matter is not privileged.”²⁹⁸ “The term ‘relevant’ is broadly defined to include material ‘reasonably calculated to lead to the discovery of admissible evidence.’”²⁹⁹ “‘The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. *Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.*’”³⁰⁰

Notwithstanding this, BP attempts to argue that it should not be required to produce the 200,260 e-mails because doing so might violate the privacy expectations of its employees.³⁰¹ However, nearly every court to consider this situation has concluded otherwise. Indeed, it is now clear under the law that there is no such reasonable expectation of privacy in an e-mail sent and received on company equipment.³⁰² The

²⁹⁸ *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 231 (Mo. Ct. App. 1996) (citing *Mo. Sup. Ct. R.* 56.01(b)(1)).

²⁹⁹ *Id.* (quoting *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995)).

³⁰⁰ *State ex rel. Missouri Ethics Comm’n v. Nichols*, 978 S.W.2d 770, 774 (Mo. Ct. App. 1998) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984)).

³⁰¹ *Relator’s Brief*, at 105-08.

³⁰² *See, e.g., Smyth v. The Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (no reasonable expectation of privacy in e-mail an employee sent to his supervisor over the company e-mail system, even though the employer made assurances that such

communications would not be intercepted by management or used as grounds for reprimand – “Once plaintiff communicated the alleged unprofessional comments to a second person ... over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost.”); *Thygeson v. U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746 (D. Or. Sept. 15, 2004) (“Thygeson used his employer’s e-mail system to send and receive personal messages, some of which he saved on personal folders on U.S. Bancorp’s computer network Thygeson could not have had a reasonable expectation of privacy in the e-mails he sent and received using his U.S. Bancorp office e-mail”); *McClaren v. Microsoft Corp.*, 1999 WL 339015 (Tex. Ct. App. 1999) (plaintiff had no reasonable expectation of privacy in his e-mail even when saved in personal folders and password protected); *Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 WL 974676, *2 (D. Mass. 2002) (the use of password protection and personal folders on the company intranet system to save e-mails sent using an office e-mail system, including sexually explicit e-mails from internet joke sites, also was found insufficient to create a reasonable expectation of privacy) (citing *McClaren*, 1999 WL 339015 at *4); *See also Commonwealth v. Proetto*, 771 A.2d 823, 829, 832 (Pa. Sup. 2001) (any reasonably intelligent person "savvy enough" to use the Internet is aware that messages are received in a recorded format and can be downloaded or printed by the party receiving the message; by sending a communication over the Internet, the party expressly consents to the recording of the message and demonstrates that he has "no reasonable expectation of privacy in his e-mails").

professed concern for privacy is almost certainly contrary to BP's own internal policies with respect to employee use of e-mail. Indeed, it is highly unlikely that BP is willing to go on record before the Court and take the position that its employees have any such expectations of personal privacy in their e-mail communications while at work, or while using BP's computers and servers.

Moreover, it is now the norm for employers to routinely monitor their employee's e-mails. Indeed, "[i]n 2001, the 700,000 member American Management Association (AMA) reported that more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files."³⁰³ It has also become the norm for computer-dependent companies such as BP to impose specific e-mail policies upon their employees. In doing so, "employers can diminish an individual employee's expectation of privacy by clearly stating in the policy that electronic

³⁰³ *TGB Ins. Services Corp. v. Superior Court*, 96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155, 161-62 (Cal. App. 2002) (citing American Management Assn., 2001 AMA Survey, *Workplace Monitoring & Surveillance, Summary of Key Findings* (April 2001) (available at www.amanet.org/research), at *Respondent's* A270; McIntosh, *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 Hamline L. Rev. 539, 541-542, n.10, at *Respondent's* A220).

communications are to be used solely for company business, and that the company reserves the right to monitor or access all employee Internet or e-mail usage.’”³⁰⁴

Thus, despite BP’s present protests, it cannot be legitimately disputed that the subject e-mails are located on BP’s own servers and computers, which are used for the purpose of carrying out BP’s business, and that the authors and recipients of the subject emails had no reasonable expectation that such e-mails would remain private and undisclosed.³⁰⁵ In any event, BP still cannot escape the fact that it has now had nearly

³⁰⁴ *TGB Ins. Services Corp. v. Superior Court*, 96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155, 161-62 (Cal. App. 2002) (quoting Fernandez, *Workplace Claims: Guiding Employers and Employees Safely In And Out of the Revolving Door*, 614 Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, Litigation 725 (1999), at *Respondent’s* A191; and citing Gantt, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 Harv. J.L. & Tech. 345, 404-405 (Spring 1995), at *Respondent’s* A125). Thus, where employers have notified their employees of an e-mail policy, Courts are even less likely to find any expectation of privacy in company e-mail systems. See, e.g., *United States v. Simons*, 206 F.3d 392, 398-99 (4th Cir. 2000) (No expectation of privacy in Fourth Amendment case where employer had an express e-mail policy allowing company to “audit, inspect, and/or monitor” employees’ use of e-mail).

³⁰⁵ "Those circuits that have addressed the question [of an expectation of privacy in e-mails] have compared e-mails with letters sent by postal mail. Although letters are

three years to review the subject e-mails for any such privacy concerns, but has failed and refused to do so. Accordingly, because BP's employees had no reasonable expectation of privacy in their use of BP's e-mail system, and because BP itself failed and refused to review its employees' e-mails for any such concerns, BP's arguments here fail and the preliminary writ should be dissolved.

V. CONCLUSION

The trial court did not abuse its discretion in sanctioning BP for discovery violations. The sanction imposed—production of 200,260 potentially relevant e-mails—is lenient and closely tied to BP's violations here. The trial court never ordered the production of privileged e-mails—repeatedly giving BP the time it requested to review e-mails for privilege and to withhold privileged e-mails. Even following this appeal, BP will have an additional fifteen days to review and remove privileged e-mails. Finally, BP's arguments about burdensomeness and cost-shifting should be rejected because the cost of BP's privilege review—estimated by BP at \$62,000—is a direct result of BP's

protected by the Fourth Amendment, 'if a letter is sent to another, the sender's expectations of privacy ordinarily terminates upon delivery.'" *United States v. Jones*, No. 03-15131, 2005 WL 2284283 (11th Cir. Sept. 20, 2005) (quoting *United States v. King*, 55 F.3d 1193, 1195-96 (6th Cir. 1995)). "Similarly, an individual sending an e-mail loses 'a legitimate expectation of privacy in an e-mail that has already reached its recipient.'" *Id.* (quoting *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001); and *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004)).

failure to follow the rules of discovery in conducting its e-mail search. Since this extra cost was caused by BP's discovery violations, the trial court did not abuse its discretion in finding that BP should bear it. In any case, courts do not shift electronic discovery costs where the cost is associated with a privilege review or where the electronic documents are in an accessible format—both of which BP admits. For these reasons BP's arguments fail and the preliminary writ should be dissolved.

Respectfully submitted,

By: _____

Michael P. Gunn, #20654

John R. Gunn, #50341

THE GUNN LAW FIRM, P.C.

1714 Deer Tracks Trail, Suite 240

St. Louis, MO 63131

Telephone: (314) 965-1200

Fax: (314) 965-1054

Attorneys on behalf of the Respondent

OF COUNSEL:

THE GUNN LAW FIRM, P.C.

Michael P. Gunn, #20654

John R. Gunn, #50341

1714 Deer Tracks Trail, Suite 240

St. Louis, MO 63131

Telephone: (314) 965-1200

Fax: (314) 965-1054

BURR & FORMAN LLP

Mark M. Lawson

Eric D. Franz

David A. Bragdon

3100 SouthTrust Tower

420 N. Twentieth Street

Birmingham, Alabama 35203

Telephone No. (205) 251-3000

CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE
AND CERTIFYING WORD COUNT

The undersigned certifies that a copy of the computer diskette containing the full text of *Brief on Behalf of Respondent* is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Mo. R. Civ. P. 55.03; (2) this Brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) this Brief contains _____ words, as calculated by the Microsoft Word software used to prepare this brief.

OF COUNSEL

CERTIFICATE OF SERVICE

I certify that I have on this 24th day of October, 2005, served a copy of the foregoing on the following by hand delivery:

David M. Harris, Esq.

Dawn M. Johnson, Esq.

Wendy M. Menghini, Esq.

Julia M. Sinn, Esq.

GREENSFELDER, HEMKER & GALE, P.C.

2000 Equitable Building

10 South Broadway

St. Louis, MO 63102

Counsel for Relator

The Honorable John R. Riley

Circuit Court of St. Louis City

22nd Judicial Circuit

Civil Courts Building

10 N. Tucker Boulevard

St. Louis, MO 63101

Respondent

I certify that I have on this 24th day of October, 2005, served a copy of the foregoing on the following by placing the same in the United States mail, properly addressed, first-class postage prepaid:

John C. Everhardus, Esq.

BP America Inc.

Mail Code 5 West

4101 Winfield Road

Warrenville, IL 60555

Counsel for Relator

Leland Dempsey

Dempsey & Kingsland, P.C.

1100 Main Street

City Center Sq. 1860

Kansas City, MO 64105-2112

Counsel for Amicus Curiae

Missouri Association of Trial Attorneys

Madeleine M. McDonough

Hugh F. Young, Jr.

Arlen L. Tanner

Product Liability Advisory Counsel, Inc.

Julie A. Shull

1850 Centennial Park Drive

Shook Hardy & Bacon, LLP

Suite 510

2555 Grand Blvd.

Reston, VA 20191

Kansas City, MO 64108

Counsel for Amicus Curiae Product Liability Advisory Counsel, Inc.

OF COUNSEL